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REGIONAL AGREEMENT ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION AND JUSTICE IN ENVIRONMENTAL MATTERS IN LATIN AMERICA AND THE CARIBBEAN

IMPLEMENTATION GUIDE

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About the guide

What to expect from the guide and who can benefit from it?

The present guide has been prepared to support the implementation of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ("Escazú Agreement"). It aims to raise awareness of the Agreement, and to provide guidance, information and different implementation options to assist States parties and other stakeholders in fully understanding and complying with the treaty provisions. The guide is also intended to be a supporting document for those States that are considering becoming parties and a tool for the public at large to become better acquainted with the Agreement.

While the content of the guide is not authoritative and does not establish a definitive legal interpretation of the provisions of the Agreement, it is intended to serve as a user-friendly reference document for government representatives, legislators, policymakers, public officials, academics, lawyers and practitioners in their study, practice and operation of the Agreement.

In offering such guidance, the guide does not prejudge the will or intent of States or bodies established by the Agreement, nor does it supersede or replace the text of the Agreement. As such, in assessing the scope and implications of each provision, it is always important to refer to the actual language of the treaty.

A number of cases relating to States' national legislation, policies or practice are cited, which accompany the explanation of the provisions by way of example in order to illustrate how some issues may have been addressed. However, by no means are they to be taken as exclusive or exhaustive.

It should also be noted that the guide does not include extensive explanations concerning those provisions on matters that have yet to be discussed and agreed by the Conference of the Parties. The guide is a work in progress. Ongoing suggestions and feedback on the same are highly welcome to improve the user experience and the guide's practical application.

How was the guide drafted?

The guide was drafted by a group of international and environmental law experts with the support of ECLAC as secretariat of the Escazú Agreement. To provide the analysis, drafters relied primarily on the authentic texts and the ordinary meaning of terms in their context and in light of the object and purpose of the treaty, in accordance with the Vienna Convention on the Law of Treaties. Meeting reports, past versions of the negotiating document and the agreed spirit and intent behind the provisions were carefully reviewed.[1] The language of both authentic texts —Spanish and English— was also duly considered. The document base also included national and regional developments on the subject matter in Latin America and the Caribbean.[2]

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[1] The legislative history of the Agreement is available at Economic Commission for Latin America and the Caribbean (ECLAC), "Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean" [online] http://www.cepal.org/en/escazuagreement.

[2] National and regional developments related to the Escazú Agreement may be consulted at Observatory on Principle 10 in Latin America and the Caribbean [online] https://observatoriop10.cepal.org/en.

Furthermore, a broader group was identified on the basis of area of expertise and invited to review and make comments on the guide. The document was then made available for consultation online, with comments received from governments, international organizations, civil society organizations, the academic sector and other interested stakeholders. Due consideration was given to all comments received.

How is the guide structured?

The guide provides both a general overview of the Agreement and a detailed article-by-article analysis of each provision along with guidance for implementation.

The first chapter includes a brief history of the process, an overview of the Escazú Agreement, general considerations for reading the Agreement and cross-cutting elements. Subsequently, chapters are structured around groupings of articles, as follows:

CHAPTER I: INTRODUCTION
- Brief history of the process
- Overview of the Agreement
- How to read the Agreement
- Cross-cutting elements

CHAPTER II: GENERAL PART
- Preamble
- Articles 1–4

CHAPTER III: ACCESS TO ENVIRONMENTAL INFORMATION
- Articles 5–6

CHAPTER IV: PUBLIC PARTICIPATION IN THE ENVIRONMENTAL DECISION-MAKING PROCESS
- Article 7

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- Article 8

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- Article 9

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- Articles 10–12

CHAPTER VIII: INSTITUTIONAL PROVISIONS
- Articles 13–18

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- Articles 19–26
- Annex 1

I. Introduction

A. Brief history of the process

The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ("Escazú Agreement") was adopted on 4 March 2018, in Escazú, Costa Rica, with the support of ECLAC as secretariat and the significant participation of the public. It entered into force on 22 April 2021.

This binding Regional Agreement of the countries of Latin America and the Caribbean is the result of an open, transparent and participatory process initiated at the 2012 United Nations Conference on Sustainable Development (Rio+20), with the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean.[3] In this Declaration, twenty years after the Earth Summit, the Governments of Chile, Costa Rica, Dominican Republic, Ecuador, Jamaica, Mexico, Panama, Paraguay, Peru and Uruguay reiterated that, as recognized in Principle 10 of the Rio Declaration on Environment and Development, environmental issues are best handled with the participation of all concerned citizens. They affirmed the essentiality of environmental access rights and recognized that despite efforts and progress, challenges and implementation gaps that hindered the full exercise of access rights remained. To that end, they agreed to launch a process to explore the feasibility of adopting a regional instrument open to all countries in the region and with the meaningful participation of the public.

To work towards that instrument, countries agreed to draft and implement a Plan of Action 2012–2014, with the support of ECLAC as the technical secretariat. As input for that plan, ECLAC was requested to conduct a study of the situation, best practices and requirements concerning access to information, participation and justice regarding environmental issues in Latin America and the Caribbean. That assessment was presented in 2013 and updated in 2018. During the negotiation phase, the review served as the basis of the preliminary document of the regional instrument and the Observatory on Principle 10 in Latin America and the Caribbean (which currently serves as the clearing house on access rights established by the Agreement). The role of ECLAC in taking stock and providing analyses and knowledge to countries and the public in support of the process has thus been fundamental.

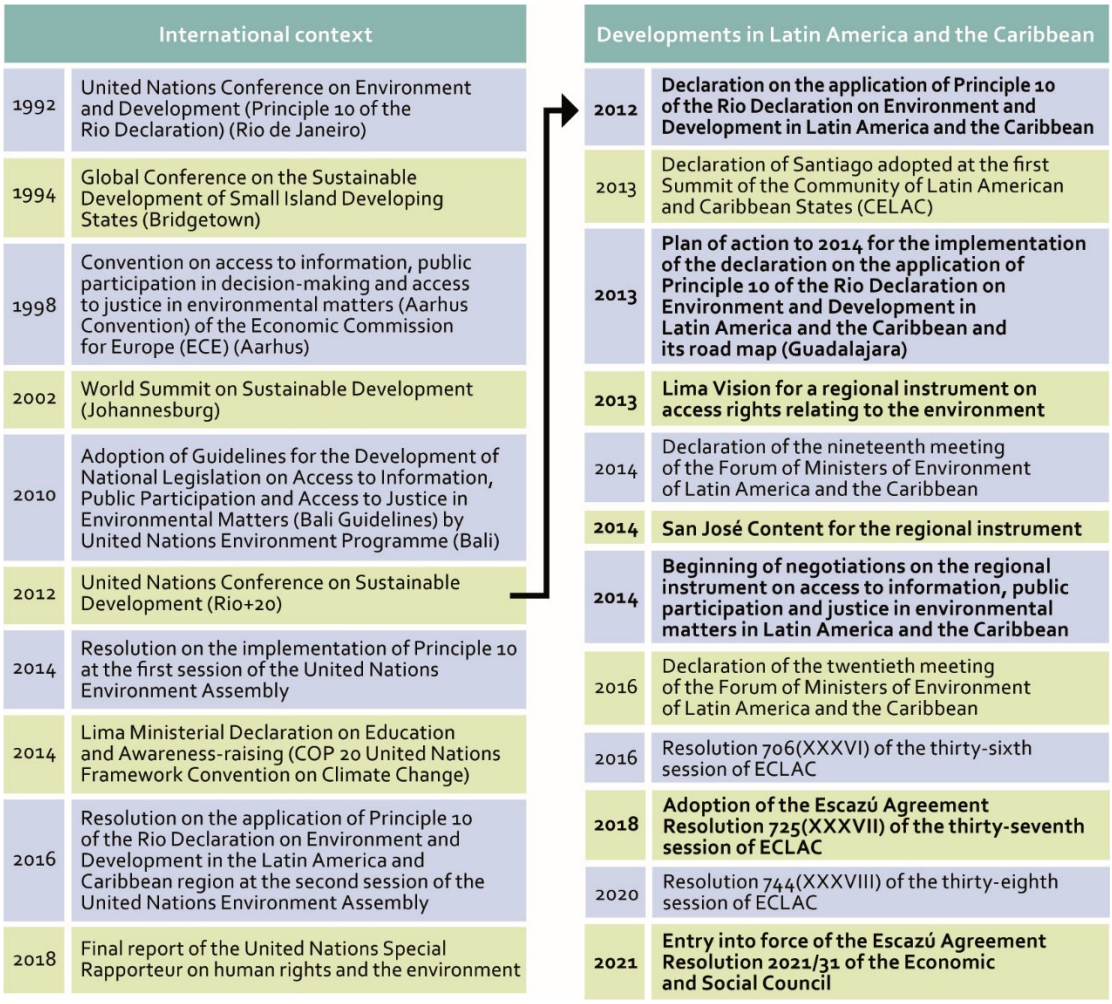
By 2018, 24 countries had endorsed the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development and adopted the Escazú Agreement. This process consisted of two distinct phases: a preparatory phase and a negotiating phase (see diagram I.1).

1. Preparatory phase

Between 2012 and 2014, four meetings of the focal points appointed by the governments of the signatory countries of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean were held (see table I.1).

[3] A/CONF.216/13.

Diagram I.1
The road to Escazú



Source: Economic Commission for Latin America and the Caribbean (ECLAC).

Table I.1
Preparatory phase

Meetings of the focal points	Adopted documents
First meeting (Santiago, 2012)	Road map
Second meeting (Guadalajara, Mexico, April 2013)	Plan of action to 2014
Third meeting (Lima, October 2013)	Lima Vision Priority lines of action for capacity-building and cooperation
Fourth meeting (Santiago, November 2014)	San José Content Santiago Decision Beginning of negotiation phase

Source: Economic Commission for Latin America and the Caribbean (ECLAC).

At these meetings, the countries adopted the following foundational documents:

(a) Road map (2012)
The road map launched a process aimed at strengthening dialogue and regional cooperation and developing a regional instrument on rights of access to environmental information, participation and justice. It defined the instrument's main principles and objectives.

(b) Plan of action to 2014 (2013)
The plan of action set forth the tasks to be accomplished up to 2014 to implement the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean. It included specific tasks, objectives, actions to be taken, resources and expected outcomes. The coordination of the process, including the establishment of working groups, and the modalities for the participation of stakeholders were defined.

(c) Lima Vision for a regional instrument on access rights relating to the environment (2013)
The Lima Vision outlined the importance and benefits of access rights and established the values and principles of the future regional instrument.

(d) Priority lines of action for 2014 (2014)
The priority lines of action established seven priorities for the working group on capacity-building and cooperation for 2014. These included the identification of best practices, the organization of regional and national capacity-building activities and the development of educational materials and training resources, among others.

(e) San José Content (2014)
The San José Content consisted of an annotated index of topics to be considered in the negotiation of the regional instrument on access rights in environmental matters.

(f) Santiago Decision (2014)
The Santiago Decision formally initiated the negotiations on the regional instrument, established a negotiating committee and requested the preparation of a preliminary document on the regional instrument.

To carry forward the preparatory phase, the signatory countries of the Declaration appointed Chile, Mexico and the Dominican Republic as Presiding Officers. The Presiding Officers provided support for the implementation of the plan of action, undertook consultations and convened intergovernmental meetings to advance the process.

Furthermore, during this period, two working groups were created to move forward in the discussions (Working group on capacity-building and cooperation (Group I), led by Colombia and Jamaica, and Working group on access rights and regional instrument (Group II), led by Brazil and Costa Rica). These working groups met on 14 occasions and concluded their mandate in November 2014.

The public was significantly involved in the process. The preparatory phase laid the groundwork for its enhanced participation (see box I.1)

Box I.1
The origins of the term "public" in the Escazú Agreement process

In the Escazú Agreement process, the term "public" first appeared in the plan of action to 2014 for the implementation of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean and its road map, adopted in Guadalajara, Mexico on 17 April 2013.

Since then, during the preparatory and negotiation phases, the public was defined as any natural or legal person or community organization. This definition was intended to be broad and inclusive in order to ensure the widest possible participation of the different stakeholders throughout the process.

Under the plan of action to 2014, a regional public mechanism was also established. Its objectives were to keep all parties interested in the process informed and facilitate their involvement, to coordinate public participation in international meetings and to contribute to the transparency of the process. The mechanism also served as a complement for participation actions carried out at the national level.

Source: Economic Commission for Latin America and the Caribbean (ECLAC).

2. Negotiating phase

With the Santiago Decision, adopted in November 2014, the signatory countries of the Declaration formally began negotiating the regional agreement with the support of ECLAC as technical secretariat. To this end, a negotiating committee was established with significant participation by the public. Presiding Officers were also appointed, and comprised Chile and Costa Rica as co-chairs and Argentina, Mexico, Peru, Saint Vincent and the Grenadines and Trinidad and Tobago. Six representatives of the public (two representatives and four alternates) were elected to maintain dialogue with the Presiding Officers (see box I.2).

The negotiating process was characterized by its transparency, openness and participatory nature.

A regional public mechanism was established to keep all parties interested in the process informed and facilitate their involvement, to coordinate public participation in international meetings and to contribute to the transparency of the process. The mechanism also served as a complement for participation actions carried out at the national level. All negotiating meetings were webcast live and open to the significant participation of the public, in accordance with the modalities for participation of the public, with the sole requirement of prior registration and physical space limitations of the conference venues. Furthermore, any person or entity was able to request the floor and send comments in writing prior to, during and after the meeting, that would be uploaded to the conference website and distributed among participants.[4] Negotiating committee meetings were attended by members of civil society organizations, academia, the private sector, regional and subregional organizations, indigenous peoples, youth and community groups and other relevant organizations from across the region.

[4] The modalities for the participation of the public provided for three levels of participation:
(i) Attendance: The public was able to attend meetings and have access to official meeting documents. Meetings could also be followed by webcast.
(ii) Reporting: The public had the right to share information and to make proposals on specific topics being discussed, in writing, to the government representatives, experts or representatives of international agencies in informal meetings or at side events when feasible.
(iii) Making statements: The public had the right to request the floor. The chair gave the floor in the order in which it was requested, regardless of whether the respective speakers were government representatives, representatives of international agencies or a member of the public (natural or legal person or community organization), aiming to ensure that everyone was heard and that the meeting was effective.

Box I.2
Election of the representatives of the public

Under the Santiago Decision, the public was invited to designate, within two months of the adoption of the Decision, two representatives to maintain a continuous dialogue with the Presiding Officers.

The representatives of the public were selected by means of an election process through the regional public mechanism and with the support of ECLAC as technical secretariat. The modalities of the election and the terms of reference were subject to a consultation within the regional public mechanism. The nominees were accepted and a virtual election took place at the beginning of 2015 among those registered in the mechanism.

The result of the process was the designation of the two candidates who received the highest number of votes (one from Latin America and one from the Caribbean). Furthermore, the next four candidates with the highest number of votes were designated as alternates. As a result, the total number of representatives amounted to six.

Source: Economic Commission for Latin America and the Caribbean (ECLAC)

The countries also requested ECLAC to prepare a preliminary document on the regional instrument to begin discussions. In the preparation of this preliminary document, the outcomes of the process to date, the San José Content for the regional instrument, the regional study prepared by ECLAC and national laws, practices and institutions of the 33 countries of Latin America and the Caribbean were considered, along with the region's challenges and needs.

Moreover, due consideration was given to international agreements and relevant multilateral environmental agreements, such as the Aarhus Convention of the Economic Commission for Europe. The input and comments from the group of experts established by ECLAC for this purpose were also considered, along with the input submitted by the signatory countries and the public as agreed in the Santiago Decision. Each item included in the preliminary document was accompanied by references to national legislation and policies or international and regional agreements, as applicable, in order to illustrate how the issues have been addressed in national, regional and international law. This legal corpus served as the basis of the Observatory on Principle 10 in Latin America and the Caribbean.[5]

Using the preliminary document as a basis, the Presiding Officers included the language proposals of the countries in a compiled text (negotiating text). After each meeting of the negotiating committee, the developments of the negotiation were recorded in the new versions of the compiled text (eight in total).

The negotiating committee adopted its organization and work plan in 2015 and the modalities for participation of the public in 2016.

The committee was composed of the following countries: Antigua and Barbuda, Argentina, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Plurinational State of Bolivia, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago and Uruguay.

The negotiating committee held nine in-person meetings and six virtual intersessional meetings in total.

[5] See the Observatory on Principle 10 in Latin America and the Caribbean [online]: https://observatoriop10.cepal.org/en.

The in-person meetings took place on:

- First meeting: 5–7 May 2015 (ECLAC, Santiago, Chile)
- Second meeting: 27–29 October 2015 (Panama City, Panama)
- Third Meeting: 5–8 April 2016 (Montevideo, Uruguay)
- Fourth Meeting: 9–12 August 2016 (Santo Domingo, Dominican Republic)
- Fifth Meeting: 21–25 November 2016 (ECLAC, Santiago, Chile)
- Sixth Meeting: 20–24 March 2017 (Brasilia, Brazil)
- Seventh Meeting: 31 July–4 August 2017 (Buenos Aires, Argentina)
- Eighth Meeting: 27 November–1 December 2017 (ECLAC, Santiago, Chile)
- Ninth Meeting: 28 February–4 March 2018 (Escazú, Costa Rica)

The final act of the ninth meeting of the negotiating committee included the formal adoption of the Escazú Agreement and established guidelines for the period comprising the opening for signature and the holding of the first Conference of the Parties. In the final act, countries requested the Presiding Officers to continue to steer and conduct the necessary work with signatory countries, significant participation by the public and the support of ECLAC as technical secretariat. Furthermore, it was decided to apply *mutatis mutandis* the modalities for participation of the public until the first Conference of the Parties and invite all Latin American and Caribbean States to sign the Agreement and to ratify, accept, approve or accede to it, as appropriate, as soon as possible.

The text of the Agreement was negotiated by consensus, using flexible working modalities which included virtual and ad hoc meetings, webinars, informative sessions and briefings, informal groups, proposals by facilitating countries and the participation of international experts to provide technical advice and assistance.

In parallel with the preparatory and negotiating phases, capacity-building and national activities were held in the different countries, with support from ECLAC, civil society and partners such as the United Nations Environment Programme (UNEP), the Economic Commission for Europe (ECE), the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the United Nations Development Programme (UNDP), among others. This was of particular relevance to countries that were not yet members of the negotiating committee, as it helped to raise awareness and understanding about the process and facilitated the engagement of additional countries.

B. Overview of the Agreement: Escazú in a nutshell

1. "Escazú and you": the basics

The Escazú Agreement is the first treaty on environmental matters of the countries of Latin America and the Caribbean, the only one stemming from the United Nations Conference on Sustainable Development (Rio+20) and the only treaty in the world to include specific provisions for the protection of human rights defenders in environmental matters.

Its objective is to guarantee the full and effective implementation in the region of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, 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 (article 1).

The Agreement is grounded in Principle 10 of the Rio Declaration on Environment and Development, which establishes that: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided".

As a treaty, the Escazú Agreement is governed by international law and establishes legally binding obligations for States parties. It has been deposited with the Secretary-General of the United Nations, is open to the 33 countries of Latin America and the Caribbean and is subject to the ratification, acceptance or approval of the States that have signed it, and to accession by any other country of the region.

The process that resulted in the Escazú Agreement is an example of how the countries of Latin America and the Caribbean can join forces to tackle common challenges and strengthen environmental governance with social and economic development, based on dialogue, cooperation and capacity-building. It is a prime example of multilateralism for sustainable development and offers an invaluable tool for improved policy and decision-making in environmental matters in the countries of the region.

The Agreement has many beneficiaries. The public are the main rights-holders, and are defined in the Agreement as one or more natural or legal persons and the associations, organizations or groups established by those persons, that are nationals or that are subject to the national jurisdiction of a State party. Particular attention is also paid to persons and groups in vulnerable situations, who are at greater risk of environmental harm or face greater difficulties in exercising their rights.

However, the benefits of the Agreement go beyond ensuring that persons can exercise their rights (see box I.3 below). Duty bearers, whether they are State entities, public authorities or private entities (when applicable), have a clear standard to abide by. Moreover, States and stakeholders will be able to build and/or strengthen their national capacities and receive assistance and support to fulfil the obligations provided for in the treaty. The Agreement also fosters greater harmonization of laws and practices, levelling the playing field, and enables some of the key challenges of the region, such as climate change and the protection of human rights defenders in environmental matters, to be addressed.

Box I.3
Key elements of the Escazú Agreement

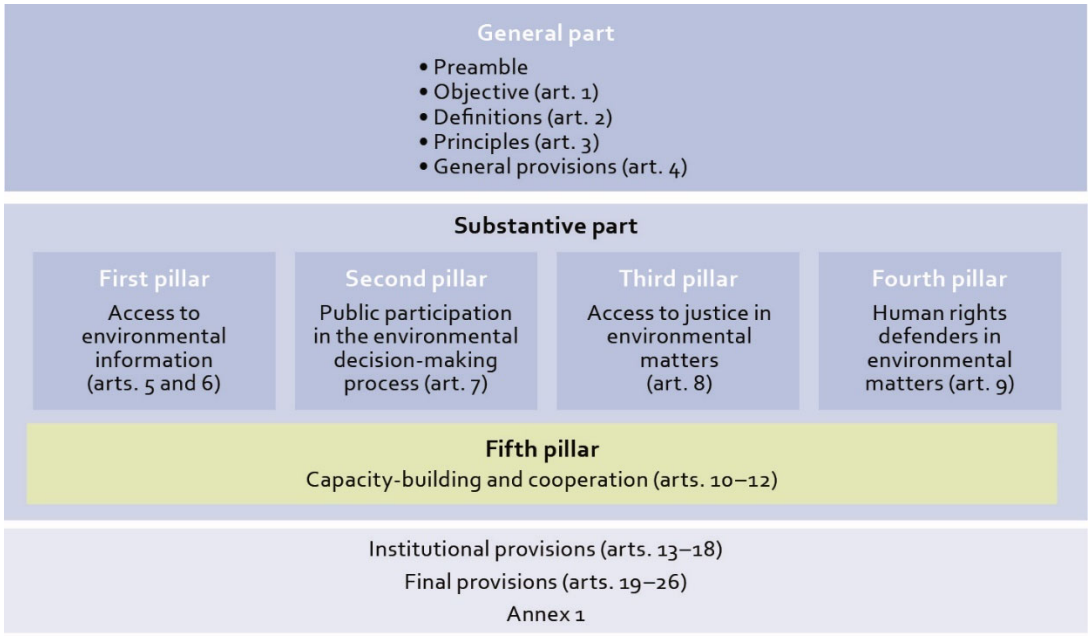
- First regional environmental treaty of Latin America and the Caribbean.
- Seeks to safeguard the right of present and future generations to a healthy environment and sustainable development, through procedural rights.
- Puts into practice Principle 10 of the Rio Declaration on Environment and Development.
- Links human rights and the environment.
- First treaty to include specific provisions on human rights defenders in environmental matters.
- Tangible expression of the ultimate aim of the 2030 Agenda for Sustainable Development: leave no one behind.
- Reflects the priorities of the region and aims to overcome the main barriers to the implementation of access rights.
- Based on the interconnectedness of access rights.
- Establishes national obligations with regional cooperation and support, creating a common standard for all.
- Centrality of capacity-building and cooperation to support implementation.
- Example of multilateralism for sustainable development and of inclusion of the public in international negotiations.

Source: Economic Commission for Latin America and the Caribbean (ECLAC)

2. A bird's-eye view of the Escazú Agreement: general structure

The regional agreement contains a preamble, 26 articles and one annex (see diagram I.2).

Diagram I.2
Structure of the Escazú Agreement



Source: Economic Commission for Latin America and the Caribbean (ECLAC).

It can be broken down into four core parts:

(a) **General part:** preamble, objective, definitions, principles and general provisions
(b) **Substantive part:** four substantive pillars (access to environmental information, public participation in the environmental decision-making process, access to justice in environmental matters and human rights defenders in environmental matters) and a cross-cutting pillar (capacity-building and cooperation)
(c) **Institutional provisions**
(d) **Final provisions and annex 1**

(a) General part

(i) Preamble

The preamble contains the general aspirations and considerations of the Escazú Agreement, recalling its origins (Principle 10 of the Rio Declaration on Environment and Development and the 2012 Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean) and key international documents and instruments (such as, inter alia, the Universal Declaration of Human Rights, the Declaration of the United Nations Conference on the Human

Environment, the Rio Declaration on Environment and Development, "The future we want" and the 2030 Agenda for Sustainable Development). It also emphasizes fundamental values and understandings such as the interconnectedness of access rights, the important role of the public and human rights defenders in environmental matters and the resolution to achieve the full implementation of access rights.

(ii) Objective

Article 1 sets out the objective of the Agreement: to guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, 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.

(iii) Definitions

The definitions included in article 2 determine the scope and understanding given by the parties to the terms used throughout the Escazú Agreement. The Agreement contains five definitions: "access rights", "competent authority" (only for the purposes of articles 5 and 6), "environmental information", "public" and "persons or groups in vulnerable situations".

(iv) Principles

Article 3 refers to the fourteen principles that shall guide the parties in implementing the Agreement. These are: equality, non-discrimination, transparency, accountability, non-regression, progressive realization, good faith, the preventive and precautionary principles, intergenerational equity, maximum disclosure, permanent sovereignty of States over their natural resources, sovereign equality of States and *pro persona*.

(v) General provisions (article 4)

The general provisions under article 4 establish certain obligations that apply to the treaty in general. They include the obligation to guarantee the right of every person to live in a healthy environment and any other universally-recognized human right related to the Agreement and that of ensuring that the rights recognized in the Agreement are freely exercised. Moreover, each party shall guarantee an enabling environment for the work of persons, associations, organizations or groups that promote environmental protection, by recognizing and protecting them. There is also the obligation to adopt the necessary measures to guarantee the implementation of the provisions of the Agreement and the recognition that the Agreement is a floor, not a ceiling: no provision in the Agreement shall prevent the parties from granting broader access rights. Each party shall likewise seek to adopt the most favourable interpretation for the full enjoyment of and respect for access rights.

(b) Substantive part: five core pillars

The Escazú Agreement is based on five core pillars, which constitute the essence of its text, provided for under articles 5 to 12. All pillars are interconnected and depend on one another to achieve the objective of the Agreement.

(i) Access to environmental information

Active and passive transparency measures are provided for in articles 5 and 6. Each party shall ensure the public's right of access to environmental information in its possession, control or custody without the need for members of the public to mention any special interest or explain the reasons for the request, and they shall

have the right to challenge and appeal the non-delivery of the information. Competent authorities shall respond to requests as quickly as possible and within a period not longer than 30 business days from the date of receipt of the request or less if so stipulated in domestic legislation. Information shall be provided at no cost, insofar as its reproduction or delivery is not required, and if so, such costs shall be reasonable and be made known in advance and may be waived if the applicant is deemed to be in a vulnerable situation. In addition, each party shall guarantee, to the extent possible within available resources, that environmental information is generated, collected, publicized and disseminated in a systematic, proactive, timely, regular, accessible and comprehensible manner. Furthermore, parties shall take steps to establish environmental information systems and pollutant release and transfer registers and encourage independent environmental performance reviews, among others. Each party shall establish or designate independent oversight mechanisms.

(ii) Public participation in the environmental decision-making process

In terms of public participation in environmental decision-making, pursuant to article 7, the public shall have mechanisms to participate in the process to issue authorizations or permits (and revisions) of projects and activities that have or may have a significant impact on the environment. Public participation in other decision-making processes (such as plans, policies, strategies, rules and regulations) shall be promoted. Participation shall take place from early stages, so that due consideration can be given to the observations of the public. Each party shall also provide the public with the necessary information in a clear, timely and comprehensive manner and stipulate reasonable timeframes. Public authorities shall also make efforts to identify the public directly affected by projects or activities that have or may have a significant impact on the environment and promote specific actions to facilitate the participation of persons and groups in vulnerable situations. Further, the article covers the promotion of public participation in international forums and negotiations on environmental matters or with an environmental impact.

(iii) Access to justice in environmental matters

With regard to access to justice in environmental matters, discussed in article 8, each party shall ensure access to judicial and administrative mechanisms to challenge and appeal any decision, action or omission related to access to environmental information and public participation in the decision-making process regarding environmental matters, as well as any other decision, action or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment. Depending on its circumstances, each party shall have competent entities with access to expertise in environmental matters; effective, timely, public, transparent and impartial procedures that are not prohibitively expensive; broad active legal standing in defence of the environment in accordance with domestic legislation and mechanisms to facilitate the production of evidence and for redress. The article also foresees the use of alternative dispute resolution mechanisms.

(iv) Human rights defenders in environmental matters

As previously indicated, the Escazú Agreement is unique in its specific protection of human rights defenders in environmental matters. Article 9 contains a preventive and a reactive approach to protect these groups of persons. Each party shall therefore guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity. Each party shall take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters. Moreover, each party shall take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the Agreement. It emphasizes the need to protect and safeguard these defenders given the dramatic situation they face in the region and their key role in environmental protection.

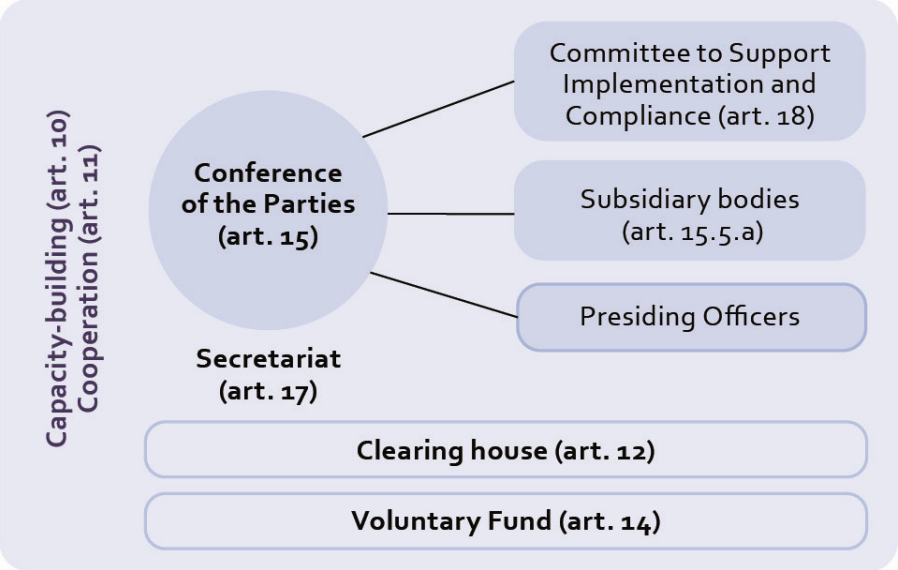
(v) Capacity-building and cooperation

Articles 10 to 12 may be considered a cross-cutting pillar underlying the other four pillars. They establish concrete capacity-building and cooperation provisions, based on each party's priorities and needs, including the training of authorities and civil servants, capacity-building programmes, the provision of adequate equipment and resources and the promotion of education and public awareness. A clearing house operated by ECLAC has also been established (Observatory on Principle 10 in Latin America and the Caribbean).

(c) Institutional provisions

The Escazú Agreement provides for the establishment of an institutional and supporting architecture (see diagram I.3).

Diagram I.3
Institutional architecture and mechanisms of the Escazú Agreement



Source: Economic Commission for Latin America and the Caribbean (ECLAC).

This part of the Agreement establishes a Conference of the Parties (article 15), designates ECLAC as the secretariat (article 17) and establishes a Committee to Support Implementation and Compliance (article 18). Article 14 outlines the establishment of a voluntary fund to support the financing of the Agreement's implementation.

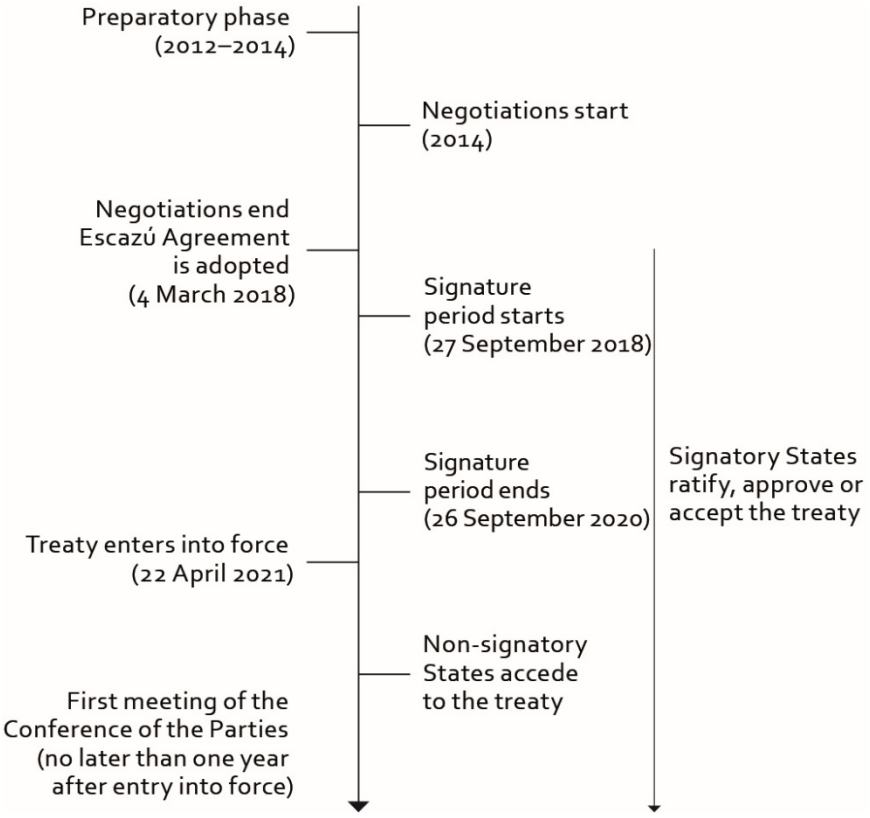
(d) Final provisions and annex 1

The final provisions contain the formalities that govern the treaty itself, including provisions on signature, ratification, acceptance, approval and accession, entry into force and the depositary, which is the Secretary-General of the United Nations.

Annex 1 lists the countries of Latin America and the Caribbean to which the Agreement is open.

A timeline of the Agreement can be found in diagram I.4.

Diagram I.4
Timeline of the Escazú Agreement



Source: Economic Commission for Latin America and the Caribbean (ECLAC).

C. How to read the Agreement

1. Holistic approach

To fully grasp the nature, extent and scope of its obligations and implications, the Escazú Agreement must be analysed in a holistic and comprehensive manner. Its provisions do not operate like silos or watertight compartments but are rather communicating components and should thus not be seen in isolation from one another. As such, it is important to look at the Agreement as a whole and consider the existing connections and interconnections between provisions. For example, the provisions on public participation should be read, among others, together with those on access to information, which guide the provision of information under public participation processes, and access to justice, which is applicable in cases where a decision, action or omission related to public participation in the decision-making process in environmental matters is challenged.

Furthermore, when reading the provisions, one must bear in mind the objective of the Agreement (article 1) as well as the definitions (article 2) and principles (article 3). The general provisions (article 4) also apply to the rest of the treaty. Thus, articles 1–4 prepare the ground for the rest of the Agreement, setting the overall goals, defining the terms and establishing the overarching tone and requirements. Moreover, the articles on capacity-building and cooperation strongly support the implementation of the obligations relating to access to environmental information, public participation in environmental decision-making and access to justice in environmental matters.

2. Nature of the obligations and use of terminology

The obligations in the Escazú Agreement are legally binding for its parties, following the fundamental principle of international treaty law *pacta sunt servanda* ("agreements must be observed"), codified in the Vienna Convention on the Law of Treaties. As in any other treaty, by becoming a party to the Agreement a State assumes the commitment to the rights and obligations enshrined therein. States therefore undertake to adapt to the treaty standard and faithfully act in accordance with such provisions, whether by the direct application of treaty provisions or by the adoption of national measures for implementing or developing the Agreement, if necessary.

However, the nature of each obligation varies from provision to provision, depending on the language and terminology used. The provisions of the Escazú Agreement were agreed by a carefully crafted consensus and the text reviewed by a group of legal experts appointed by the negotiating committee prior to adoption.[6] Whereas some obligations use more specific, authoritative, and mandatory language, others are drafted with considerable flexibility and permit alternative courses of action by States.

For example, "shall" describes obligations where there is a mandatory intent (must), imposing a strong obligation on duty-bearers. Usually, it creates an obligation for action for the addressee. The use of the verb "should" entails an obligation to consider the advice or recommendation to undertake an action. However, it implies a stronger imperative than "may". In turn, usually the verb "may" entails discretionary action and, although it creates no formal obligation for the addressee, it establishes guidance and recommendations for a State party, thereby informing its conduct in a persuasive and compelling manner.[7]

Many of the provisions of the Escazú Agreement also incorporate lists, which are mostly indicative and non-exhaustive in nature (i.e. the contents of environmental information systems under article 6.3 or the state of the environment reports under article 6.7). The terms "that may include" or "inter alia" indicate that the elements are mere examples of elements that could be included. Meanwhile, some of the lists are minimum standards, such as those related to the provision of information in public participation processes (articles 7.6 and 7.17).

Other recurrent terminology in the Escazú Agreement refers to qualifying terms, such as "as appropriate", "when necessary", "to the extent possible", to allow parties to adapt each obligation on a case-by-case basis and provide flexibility in the implementation of the obligation according to each national system and context. However, it should be noted that such qualifiers do not grant absolute discretion to States and compliance may be measured against objective elements or criteria.

3. Rights-holders and duty bearers

As an environmental treaty that incorporates a human-rights based approach, the Escazú Agreement clearly establishes rights-holders and duty bearers. On the one hand, rights-holders are those persons and groups that are recognized as having a specific right or set of rights, and that are entitled to claim them and hold duty bearers to account. Duty bearers are those actors that have a particular obligation or responsibility under the Agreement. The term normally refers to State actors; however, depending on the domestic system, non-State actors may be called to fulfil a specific obligation in accordance with national law.

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[6] The group of legal experts was chaired by Marcelo Cousillas, representative of Uruguay, and supported by Santiago Villalpando, former Chief of the Treaty Section of the United Nations Office of Legal Affairs, and Concepción Escobar Hernández, Full Professor of International Law at the National University of Distance Education (UNED) of Spain and member of the United Nations International Law Commission. ECLAC served as technical secretariat. All the group's meetings were open to country delegates and the public.

[7] Note that the use of "may" is different in some provisions of the Agreement. For example, in article 5.6, the verb "may" is intended to mean a permission to use an exception to deny access to environmental information and not a recommendation. See chapter III for additional information.

Under the Escazú Agreement, several rights-holders and duty bearers can be identified (see table I.2).

Table I.2
Examples of rights-holders and duty bearers in the Escazú Agreement

Rights-holders
● Every person (of present and future generations) ● Public[a] ● Persons and groups in vulnerable situations[a] ● Persons, associations, organizations or groups that promote environmental protection ● Applicant ● Public directly affected ● Human rights defenders in environmental matters
Duty bearers
● Party/parties ● Competent authority[a] ● Public authority[b] ● Competent State entities[c]

Source: Economic Commission for Latin America and the Caribbean (ECLAC).
[a] as defined in article 2.
[b] as used in article 7.
[c] as used in article 8.

4. Rules of interpretation

Articles 31–33 of the Vienna Convention on the Law of Treaties establish principles and rules for the interpretation of treaties that also apply to the Escazú Agreement. Pursuant to the Convention, the general rule is that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (article 31.1 of the Convention).

With regard to the Escazú Agreement, in addition to the "good faith" criterion, any interpretation shall primarily consider the text, context and object and purpose of the treaty. Preference is therefore given to the ordinary meaning of the words. However, the determination of the ordinary meaning of the terms can only be done in the context and in light of the object and purpose of the treaty. In that regard, the Escazú Agreement must be seen as a whole, including the preamble and annex, and the terms have to be considered in the context within which they are employed (i.e. in the environmental field and using a rights-based approach). The object and purpose of the treaty, as described in article 1, are likewise essential. The definitions included in article 2 give a special meaning to certain terms included therein.

Supplementary means of interpretation may be recurred to, including the preparatory work of the treaty (*travaux préparatoires*) and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of the aforementioned general rule, or to determine the meaning when the interpretation according to that rule leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Any interpretation must always be made in "good faith".

Another useful document for the interpretation of the Escazú Agreement is the final act of the ninth meeting of the negotiating committee of the Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean, which adopted the Escazú Agreement. Decisions emanating from treaty bodies (such as the Conference of the Parties and the Committee to Support Implementation and Compliance) could likewise provide further clarity to interpret its provisions, in accordance with article 31.3 (a) and (b) of the Vienna Convention on the Law of Treaties.

To confirm the meaning of the text in context and in light of the object and purpose, special relevance has to be attributed to the preparatory work including the meeting reports, the text compiled by the Presiding Officers incorporating the language proposals from the countries on the preliminary document of the Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean, and article proposals made by countries during the negotiations.

Finally, the Escazú Agreement was adopted in English and Spanish, and both versions are equally authentic. In accordance with article 33 of the Vienna Convention on the Law of Treaties, the terms used in both versions are presumed to have the same meaning. If any difference of meaning should emerge, a meaning which reconciles the English and Spanish texts should be adopted, having regard to the object and purpose of the Agreement.

5. National implementation

Implementation at the national level is at the core of treaty effectiveness, leaving the ultimate responsibility for complying with its terms generally with each party. Each party is, therefore, responsible for meeting the obligations and taking the necessary measures to bring about that compliance. By implementing the treaty, parties make it effective in their national legal systems.

Implementation is included in the very objective of the Escazú Agreement, which aims to guarantee the full and effective implementation of environmental access rights in Latin America and the Caribbean. Implementation is likewise guided by the principles included in article 3, such as non-regression and progressive realization. Article 4.3 further mandates each party to "adopt the necessary measures, of a legislative, regulatory, administrative or any other nature, in the framework of its domestic provisions, to guarantee the implementation of the provisions of the present Agreement". Moreover, article 13 establishes that "each Party, to the extent of its ability and in accordance with its national priorities, commits to provide the resources for national activities that are needed to fulfil the obligations derived from the present Agreement." As a result, the Escazú Agreement leaves a wide array of options open, as to the types of measures and approaches a State can take and the resources it devotes, to meet its obligations.

Parties may introduce a number of implementation measures and, as long as they are fully compliant with their obligations, also enjoy a margin of discretion as to the means used. Some countries require the adoption of national legislation, including subordinate legislation, for example legal measures adopted by the executive branch such as orders, regulations, decrees or policies. Other countries do not prescribe a specific format for such measures, leaving the implementer to decide on the best means to be used. What is most important is consistency and compatibility, so that there are no discrepancies between the Escazú Agreement and national law. Therefore, implementation measures deserve careful attention and shall be assessed on a case-by-case basis.

The self-execution doctrine is likewise relevant to national implementation. By means of this doctrine generally accepted in international law, the self-executing provisions of a treaty can be given legal effect nationally without the need of further implementing national legislation. Even if the self-executing character of a treaty provision has to be determined on a case-by-case basis, there are some criteria to be considered with regard to the Escazú Agreement. The following is a non-exhaustive list of these criteria:

(i) that the provision creates clear and enforceable rights and duties and is not merely programmatic; (ii) that such rights and obligations are created for individuals or groups and (iii) that the provision can be applied without the need of any national measure that develops or completes the treaty provision.

The Escazú Agreement makes references to national legislation in several provisions by using different terms: "in accordance with", "in the framework of", "based on" or "taking into account". Depending on the case, such terms were intended to either specify the obligations or allow parties the possibility to use their own methods or means of implementation, without affecting the basic obligation. The flexibility is, however, not unlimited, as parties do not have the liberty to introduce or maintain legislation that is contrary to, undermines or is inconsistent with the obligation at hand.

D. Cross-cutting elements

1. Driving forces

The Escazú Agreement is premised on several driving forces. During the negotiation, countries were emphatic as to common understandings underlying the Agreement, which influenced and were the basis of its spirit and provisions. These driving forces are reflected, to a greater or lesser extent, in the text of the Agreement itself, such as the full and effective implementation of rights included in the objective or the ideas of accountability, progressive realization and non-regression, which are included among the principles. These inspirational forces are also embedded in the Agreement in general, for example in the accommodation of the different contexts and realities of countries and complementarity of the Escazú Agreement provisions with other international commitments.

Some of these driving forces include:

(i) Different approaches to common problems: the region faces common environmental challenges, but countries may take different approaches and types of measures to reach the same objective. Even when countries already possess advanced systems before becoming parties, having a regional standard for all countries is in the best interest of all, as it establishes a level playing field where rights and environmental standards are not tradable assets and environmental trade-offs and power imbalances between countries are avoided or minimized.

(ii) Although countries reflect different levels of implementation, all have something to gain and something to offer: the Escazú Agreement is not only for the countries with less developed systems or experience in the implementation of access rights. The most advanced countries may also have room for improvement and can further develop environmental access rights. At the same time, even less developed countries may be able to share positive experiences and practices with peers. In that regard, the Agreement is a win-win situation for all.

(iii) Non-punitive approach: the aim of the Escazú Agreement is not to punish countries, but to build capacities and offer a platform for cooperation and mutual exchange for the benefit of all. For this reason, the Agreement provides for the principle of progressive realization and states that the Committee to Support Implementation and Compliance is non-adversarial, non-judicial and non-punitive, with the emphasis being placed on assistance, capacity-building and cooperation.

(iv) **A floor, not a ceiling, and reflecting complementarity with other commitments:** the regional standard included in the Agreement is a minimum but by no means does it establish a maximum degree of protection. States that already have more progressive systems or practices would therefore continue to apply them despite the entry into force of the Agreement. Likewise, should a State party adopt more progressive regulations nationally after becoming a party to the Agreement, preference will be given to these new regulations.

(v) **Spirit of partnership:** it implies that the parties and rights-holders will act with and among each other in a spirit of honesty, fairness and sincerity of intention, so as to diligently work towards the ultimate aim of the Agreement and not deliberately or purposefully hinder the rights and obligations of others.

(vi) **Leave no one behind:** the underlying basis of the Agreement is to provide equal opportunities to all persons, so that everyone can exercise their rights on equal footing and without discrimination. This ideal inspires all provisions and is materialized in the general duty to guide and assist the public, particularly persons and groups in vulnerable situations, and the specific measures contained under each pillar. Leaving no one behind applies not only to persons within a State but also among States. In that regard, in their cooperation to build national capacities to implement the Agreement, the parties shall give particular consideration to least developed countries, landlocked developing countries and small island developing States in Latin America and the Caribbean.

2. The connection with human rights

The Escazú Agreement expressly links environmental matters with human rights and ensures procedural rights that are essential to achieve the right to a healthy environment and sustainable development.

In general terms, the rights of access to information, public participation and access to justice are governed by the International Covenant on Civil and Political Rights (articles 19, 25 and 2.3 and 14, respectively) as well as other international human rights standards (see table I.3). The American Convention on Human Rights and other international human rights standards also apply. As a result, States are obliged to respect and guarantee these rights on an equal and non-discriminatory basis. The special protection granted under international human rights law is based on the fundamental nature of these rights for democratic life and their value as catalysts for the realization of other rights, supporting good governance, transparency, accountability and inclusive and participatory public management.

The human rights connection is not only made because of the substantive human rights regulated by the Escazú Agreement, but also because of the human rights-based approach the treaty takes throughout its text. The Escazú Agreement aims to address the inequalities in environmental management and systematically refers to and applies human rights principles and standards. It focuses on rights, rather than needs, favours both the process and the result, and provides for specific measures to assist persons and groups, empowering people and societies to protect our planet. Special attention is given to persons and groups in vulnerable situations, aiming to ensure equality and non-discrimination at all times. Furthermore, rights-holders and duty bearers are identified, and specific oversight mechanisms and guarantees are provided for.

The references to human rights are recurrent throughout the text of the Escazú Agreement. In its preamble, for example, the Agreement establishes that access rights contribute to the strengthening of human rights, inter alia, and reaffirms the importance of the Universal Declaration of Human Rights and other international human rights instruments. Its principles also include fundamental human rights standards, notably the principles of equality and non-discrimination, non-regression and progressive realization, and *pro persona*. Moreover, article 9 of the Agreement calls on parties to recognize, protect and promote all the rights of human rights defenders in environmental matters.

Table I.3
Access rights in international human rights standards

	Information	Participation	Justice
International Covenant on Civil and Political Rights (ICCPR)	x	x	x
• General Comment no. 37 (right of peaceful assembly) • General comment no. 36 (right to life) • General comment no. 34 (freedom of expression) • General comment no. 31 (general legal obligation) • General comment no. 25 (public participation)	x	x	x
International Covenant on Economic, Social and Cultural Rights (ICESCR)			
• General comment no. 25 (science and economic, social and cultural rights) • General comment no. 24 (business activities) • General comment no. 21 (right to cultural life) • General comment no. 15 (right to water) • General comment no. 14 (right to health)	x	x	x
International Convention on All Forms of Racial Discrimination (ICERD)	x	x	x
• General recommendation no. 34 (people of African descent) • General comment no. 23 (indigenous peoples)		x	x
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)		x	x
• General comment no. 37 (disaster risk reduction in the context of climate change) • General recommendation no. 34 (rural women) • General recommendation no. 27 (older women) • General recommendation no. 24 (women and health) • General recommendation no. 23 (political and public life)	x	x	x
Convention on the Rights of the Child (CRC)	x	x	x
• General comment no. 25 (digital environment) • General comment no. 24 (child justice system) • General comment no. 16 (impact of business sector) • General comment no. 15 (right to health) • General comment no. 12 (right to be heard)	x	x	x
Convention on the Rights of Persons with Disabilities (CRPD)	x	x	x
• General comment no. 2 (accessibility) • General comment no. 1 (equal recognition before the law)	x	x	x

Source: Economic Commission for Latin America and the Caribbean (ECLAC).

A significant human right recognized in the Agreement is the right to live in a healthy environment. This inclusion reinforces the virtuous circle between the environment and human rights, where access rights contribute to a healthy environment but where the right to a healthy environment is a right on its own and enables the realization of other human rights.

The diversity and different capacities, vulnerabilities and conditions of persons and groups in the countries of the region are recognized in the Agreement. Each main pillar includes measures that refer to persons and groups in vulnerable situations from a rights-based approach. Another core pillar of the Agreement is the protection and promotion of the rights of human rights defenders in environmental matters.

Several United Nations human rights bodies and mechanisms, including the Human Rights Council and its special procedures, have underlined the interconnection between the Escazú Agreement and human rights (see box I.4).

Box I.4
Statements by United Nations human rights experts on the Escazú Agreement

United Nations human rights experts have applauded the Escazú Agreement, its negotiation process and its entry into force by means of joint public statements.

In an open statement in October 2015, 15 Human Rights Council experts expressed their strong support for the efforts by governments in Latin America and the Caribbean to agree on a regional legal instrument on rights of access. They affirmed that "[the] negotiation is one of the most important steps ever taken to protect and promote environmental democracy at the international level, and it will provide a model for such steps in other regions and countries." Moreover, the experts stated that:

- Rights of access are at the fulcrum of the relationship between human rights and sustainable development.
- A strong regional instrument will further enhance robust domestic laws implementing multilateral environmental agreements and domestic policies in other areas, including climate change, chemicals and waste management, and biological diversity.
- An adequate legal framework is indispensable to give effect to access rights, and a treaty enables adoption and enforcement of adequate internal laws.
- The instrument can channel development and technical assistance to strengthen institutional capacities, by providing the structural mechanisms for North-South development assistance and South-South regional cooperation.
- The transparent and inclusive negotiating process is commendable and an international good practice.

In turn, in a statement issued in September 2018, 28 Human Rights Council mandate holders highlighted that the "regional treaty not only guarantees good governance and basic democratic rights but is also an enabler for environmental protection and sustainable development". The experts urged Latin American and Caribbean countries to promptly ratify this landmark environmental treaty.

Moreover, in November 2020, 39 mandate holders welcomed the impending entry into force of the Escazú Agreement, lauding it as a groundbreaking pact to fight pollution and secure a healthy environment.

Source: Economic Commission for Latin America and the Caribbean (ECLAC).

3. Contribution to the 2030 Agenda and the Sustainable Development Goals

The access rights regulated by the Agreement are essential to eradicate poverty, reduce inequalities and protect our planet. They are also fundamental to strengthen transparent and participatory democracies in which people are meaningfully involved in the decisions that affect their lives and environment. The generation of data on sustainable development, timely access to information, knowledge and information and communications technologies, education for sustainable development, participatory planning and management and the fostering of peaceful and strong institutions are some of the areas in which the Escazú Agreement offers added value. This makes the Agreement particularly relevant in the achievement of the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs).

The Escazú Agreement fosters multilateralism for sustainable development and supports the implementation of the 2030 Agenda for Sustainable Development. Its tenets are interwoven with all SDGs (see diagram I.5). In particular, the Escazú Agreement supports Goal 16 which promotes peaceful and inclusive societies, requires the guarantee of equal access to justice, effective, reliable and transparent institutions and the adoption of inclusive, participatory and representative decisions. It also calls for public access to information and the promotion of non-discriminatory laws and policies for sustainable development.

Diagram I.5
Sustainable Development Goals and targets directly related to the Escazú Agreement

Source: Economic Commission for Latin America and the Caribbean (ECLAC).

The effective implementation of the Escazú Agreement likewise strengthens the balanced implementation of the three dimensions of sustainable development: economic, social and environmental. Thus, it ensures that development does not take place at the expense of the environment and that environmental concerns are duly considered in the economic and social spheres.

4. Relation with other international treaties

The Escazú Agreement complements and supports other international treaties, including multilateral environmental agreements (see table I.4) and human rights treaties. As a result, by implementing the Escazú Agreement, States will also contribute to the implementation of other international commitments and vice versa.

Table I.4
Access rights in multilateral environmental agreements

	Access to information	Participation	Access to justice	Capacity-building
Paris Agreement	x	x		x
Minamata Convention on Mercury	x	x		x
Stockholm Convention on Persistent Organic Pollutants	x	x		x
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade	x	x	x	x
United Nations Convention to Combat Desertification	x	x	x	x
Convention on Biological Diversity	x	x	x	x
United Nations Framework Convention on Climate Change	x	x		x
Kyoto Protocol to the United Nations Framework Convention on Climate Change	x	x		x
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal	x	x	x	x
Vienna Convention for the Protection of the Ozone Layer	x	x	x	x
Montreal Protocol on Substances that Deplete the Ozone Layer	x	x		x
Convention on International Trade in Endangered Species of Wild Fauna and Flora	x	x	x	x
Convention on Wetlands of International Importance especially as Waterfowl Habitat	x	x		x

Source: Economic Commission for Latin America and the Caribbean (ECLAC).

The Escazú Agreement expressly permits the application of more favourable standards contained in other international instruments. Article 4.7 states that "no provision in the present Agreement shall limit or repeal other more favourable rights and guarantees set forth, at present or in the future, in the legislation of a State Party or in any other international agreement to which a State is party, or prevent a State Party from granting broader access to environmental information, public participation in the environmental decision-making process and justice in environmental matters."

Moreover, as regards the rights of indigenous peoples, article 7.15 of the Escazú Agreement provides that "each Party shall guarantee that its domestic legislation and international obligations in relation to the rights of indigenous peoples and local communities are observed". As a result, the Escazú Agreement does not alter such rights and those countries that, for example, are parties to the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization will continue to apply their standards accordingly in matters related to the Agreement.

5. Interconnectedness of access rights

As States recognized in the preamble to the Escazú Agreement and during the preparatory[8] and negotiating phases of the process, the access rights to information, public participation and justice in environmental matters are interlinked, interrelated and interconnected. The three rights are mutually reinforcing and interdependent. This means that no single access right can be fully implemented without the other, and the violation of one right may affect the enjoyment of the other. The consideration of the interconnected nature of access rights is a corollary of the holistic approach required when reviewing the Escazú Agreement.

6. Persons and groups in vulnerable situations

Special attention is given to persons or groups in vulnerable situations, defined as those persons or groups that face particular difficulties in fully exercising access rights because of circumstances or conditions identified within each party's national context and in accordance with its international obligations. In this regard, guidance and assistance shall be provided to the public in order to facilitate the exercise of their access rights and each pillar contains specific provisions towards that aim. For example, parties shall endeavour, where applicable, to ensure that the competent authorities disseminate environmental information in the various languages used in the country and prepare alternative formats that are comprehensible to those groups, using suitable channels of communication (article 6.6). Public authorities shall make efforts to identify and support persons or groups in vulnerable situations in order to engage them in an active, timely and effective manner in participation mechanisms (article 7.14). Furthermore, article 8.4 requires States to establish measures to minimize or eliminate barriers to the exercise of the right of access to justice, among others.

The establishment of affirmative measures for specific groups is contemplated by international human rights law. Human rights instruments aim to protect all persons and particularly address the challenges faced by those that are more likely to suffer human rights violations. As a result, human rights standards and provisions foresee specific obligations and safeguards to protect vulnerable individuals and groups. Some human rights treaties focus specifically on certain groups such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. States are, therefore, obliged to adopt the necessary measures to counter or change existing discriminatory practices and situations and place everyone on equal footing to exercise their rights.

[8] See paragraph (e) of the Lima Vision (2013).

Such measures ensure equal conditions and non-discrimination among all persons, and depending on the circumstances, may allow for justified differences of treatment based on objective and reasonable grounds and provided these are necessary to the full and effective enjoyment of rights by all.[9] Differences in fact may allow for differences in law that do not amount to discrimination but rather aim to avoid it. Equals should be treated equally and unequals unequally. The existence of such measures does not imply different categories of 'citizens' or of 'rights'. All individuals have the same rights and duties, but some such as persons and groups in vulnerable situations may require proactive support by duty bearers to enable the rights-holders to fully exercise the same rights as everyone else in conditions of equality and non-discrimination.[10]

7. Reaffirming and developing access rights in environmental matters

The Escazú Agreement reaffirms existing rights and specifies detailed corresponding obligations for environmental matters.

This is evident from the way each right is developed in the Agreement. The first numeral of each access right provision uses strong and clearly mandatory language. For example, under article 8, "each Party shall guarantee the right of access to justice in environmental matters in accordance with the guarantees of due process".

The subsequent numerals spell out the standard applicable to that right in more specific terms and adjusts it to the particularities and specificities of environmental matters (following the example of access to justice, focusing on issues such as environmental damage, legal standing or expertise in environmental matters).

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[9] According to the Committee on Economic, Social and Cultural Rights, "eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination" (Committee on Economic, Social and Cultural Rights (CESCR), "General Comment No. 20" (E/C.12/GC/20), Geneva, 2009).

[10] The Committee on Economic, Social and Cultural Rights has indicated that such measures are legitimate as long as they "represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities" (Committee on Economic, Social and Cultural Rights (CESCR), "General Comment No. 20" (E/C.12/GC/20), Geneva, 2009).

II. General part

The general part of the Escazú Agreement is composed of the preamble, the objective (article 1), the definitions (article 2), the principles (article 3) and the general provisions (article 4). These five components lay the foundations of the Agreement and facilitate its overall implementation.

The preamble introduces the Agreement, indicates its underlying reasoning, and sets out important guidelines for interpretation. In turn, the objective defines the overall aim of the Agreement, conveying its object and purpose. The definitions provide a common meaning to certain terms of the Agreement and the principles offer guidance for implementation. Lastly, the general provisions regulate different obligations that apply to all pillars of the Agreement.

A. Preamble

The preamble to a treaty introduces its text. Although it is an integral part of the treaty, it does not contain binding obligations for the parties, and can therefore be considered expository.

Notwithstanding the above, the preamble serves important functions. It situates the treaty within its broader background and context, offers valuable guidance for interpretation and provides the narrative behind the treaty, explaining its origins, related developments, common understandings and aspirations. The preamble also emphasizes certain ideals and motivations that inspired the parties in the treaty-making process.

The Vienna Convention on the Law of Treaties gives the preamble a clear interpretative function. Article 31 (paragraphs 1 and 2) of the Vienna Convention establishes that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the object and purpose, and the context shall include the treaty's preamble. The preamble can contribute to an understanding of the object and purpose of the treaty.

It should be noted that preambles typically include references to "soft law" instruments, mainly declarations or resolutions that served as motivation for the treaty. However, their inclusion in the preambular part of the treaty does not render these instruments binding.

The preamble to the Escazú Agreement consists of 14 paragraphs. Following the traditional wording of preambles in international instruments, paragraphs in the Agreement are not numbered. However, for explanatory purposes, the guide has numbered the paragraphs in the same order they appear in the preamble.

These paragraphs can be divided into five main groups: (1) paragraphs 1 and 2 refer to the origins of the treaty; (2) paragraphs 3 and 4 refer to the nature and contribution of access rights; (3) paragraphs 5 to 9 mention related "soft law" instruments; (4) paragraphs 10 and 11 contain other relevant topics for the region such as multiculturalism and the work of the public and human rights defenders; and (5) paragraphs 12 to 14 refer to the recognition of the progress made, the need of strengthening capacity-building and cooperation and the resolution to achieve the full implementation of access rights.

The Parties to the present Agreement,

[1] *Recalling* the adoption, at the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, in 2012, of the Declaration on the application of Principle 10 of the Rio Declaration, reaffirming the commitment to the rights of access to information, participation and justice regarding environmental issues, recognizing the need to make commitments to ensure proper fulfilment of those rights and declaring a willingness to launch a process for exploring the feasibility of adopting a regional instrument,

The preamble starts with a reference to the origins of the process. As noted previously, at the United Nations Conference on Sustainable Development in 2012 (Rio+20), the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development[11] was signed, giving way to preparatory and negotiation phases of a regional instrument on the matter.

Initially signed by the Governments of Chile, Costa Rica, the Dominican Republic, Ecuador, Jamaica, Mexico, Panama, Paraguay, Peru and Uruguay, the Declaration was later subscribed by Antigua and Barbuda, Argentina, Brazil, Colombia, Dominica, El Salvador, Grenada, Guatemala, Honduras, the Plurinational State of Bolivia, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago. A total of 24 countries endorsed the Declaration throughout the process, with other countries participating as observers.

The Declaration captured certain common agreements and understandings. It reiterated principle 10 of the Rio Declaration on Environment and Development, which recognized that environmental issues are best handled with the participation of all and that each individual should have appropriate access to information, the opportunity to participate in decision-making processes and effective access to judicial and administrative proceedings. It was also stressed that to comply with this principle, States should facilitate and promote education, awareness-raising and public participation by making information widely available and providing effective access to the proceedings outlined above.

Moreover, the Declaration also determined that despite regional and national efforts and progress, far more concerted, proactive, and effective action was needed to successfully implement environmental access rights. As a result, countries expressed their willingness to enhance the exercise of those rights with the active involvement of the key stakeholders and society as a whole. Accordingly, a regional process to explore the feasibility of adopting a regional instrument on the matter was launched.

In more concrete terms, the Declaration included the commitment to drafting and implementing a Plan of Action 2012–2014, with the support of the Economic Commission for Latin America and the Caribbean (ECLAC) as the technical secretariat, to work towards such a regional convention or other instrument. Governments also later requested ECLAC to conduct a study of the situation, best practices and requirements concerning access to information, participation and justice regarding environmental issues in Latin America and the Caribbean.

[11] United Nations, "Note verbale dated 27 June 2012 from the Permanent Mission of Chile to the United Nations addressed to the Secretary-General of the United Nations Conference on Sustainable Development" (A/CONF.216/13), New York, 2012.

[2] *Reaffirming* Principle 10 of the 1992 Rio Declaration on Environment and Development, which establishes the following: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided",

Preambular paragraph 2 transcribes principle 10 of the Rio Declaration on Environment and Development. This principle can be considered the building block on which the Escazú Agreement is based and materializes the original aspirations of countries of the region, which in 2012 began a regional process that would support its implementation in Latin America and the Caribbean.

As one of the 27 principles contained in the 1992 Rio Declaration on Environment and Development, principle 10 revolves around the rights of access to information, public participation and justice to enhance environmental management. It also reflects the first international consensus that environmental challenges require greater transparency, public engagement and justice.

Certain core elements were already deemed fundamental within each access right when principle 10 was adopted. These include the broad scope of environmental information to which every person shall have access, and which shall include that on hazardous materials and activities. Additionally, it stipulated that participation shall be informed and take place at relevant levels. It also indicated that access to justice includes administrative and judicial mechanisms as well as compensation for damages and remedies, and that education and awareness are essential for the exercise of such rights.

The fact that the three rights are jointly developed in the same principle also denotes their interrelatedness and complementary nature, which is also emphasized in the subsequent preambular paragraph.

[3] *Emphasizing* that access rights are interrelated and interdependent, and so each and every one of them should be promoted and implemented in an integrated and balanced manner,

The interconnection and interdependency between access rights is expressly highlighted in this paragraph. As human rights, access to information, public participation and access to justice are standalone rights but also serve as bases for one another and need to be implemented jointly. The preamble reaffirms a human rights-based approach, as all human rights are universal, indivisible, interdependent and interrelated. Consequently, no human right can be enjoyed in isolation, but every single one of them depends on the realization of the other rights.

It is the first time in the Agreement that the concept "access rights" is used. As defined in article 2, the term refers to the rights of access to environmental information, the right of public participation in the environmental decision-making process and the rights of access to justice in environmental matters as later defined.

The interrelatedness and interconnection of these "access rights" were a common understanding from the outset of the regional process. Since its early days, there was consensus that the regional instrument that could emanate from the process had to address all three access rights included in principle 10 of the Rio Declaration on Environment and Development. The preparatory work reflected this understanding in the

different documents that were agreed during the process. In fact, the language of this paragraph can be found literally in the Lima Vision, which reads that "access rights are interrelated and interdependent, and so each should be promoted and implemented in an integrated and balanced manner." The Lima Vision highlights the importance and benefits of the three rights and underlines their close connection.

Access rights are synergistic in various ways. Access to information allows for more informed and effective participation and contributes to well-founded judicial and administrative claims and decisions. In turn, public participation contributes to improving and complementing the information that is available and can resolve conflicts before they escalate and require dispute resolution. Access to justice, meanwhile, includes guarantees so that the procedural rights of access to information and public participation are respected.

The nexus between access rights is not only stated in the preamble but also incorporated throughout the Agreement. By way of example, article 7 considers the provision of information a key component of public participation, and article 8 on access to justice requires that information on rights and procedures be publicized.

Furthermore, it was understood that, although access rights could progress differently at the national level, all needed to be implemented in an integrated and balanced manner. This means that no access right prevails over another and that States are required to implement all rights comprehensively and coherently.

[4] *Convinced* that access rights contribute to the strengthening of, inter alia, democracy, sustainable development and human rights,

After emphasizing their interconnected and interdependent nature, the preamble then goes on to reaffirm the overall contribution of access rights. The paragraph expresses that access rights contribute, for example, to democracy, sustainable development and human rights.

Access rights are essential human rights for democratic life and fundamental to achieve good governance and inclusive and participatory public management. They strengthen democracy by increasing transparency and accountability, ensuring the views and concerns of the public are taken into account in public policy and by enabling review and control. They also strongly contribute to sustainable development by fostering environmental governance. The paragraph points to the virtuous circle between access rights, the environment and human rights.

During the preparatory phase of the Escazú Agreement, several documents underscored the contribution of access rights to the three areas. In the road map, access rights are considered prerequisites for building a citizenry that is committed to sustainable development. In turn, the Lima Vision recognized that the exercise of the rights of access to information, participation and justice in environmental matters deepens and strengthens democracy and contributes to better protection of the environment and, consequently, of human rights.

The contribution is recognized for the three access rights as a whole, thereby underlining once again their equal value and interrelated nature. That is, the contributions of all three rights to society are considered equally important.

[5] *Reaffirming* the importance of the Universal Declaration of Human Rights and recalling other international human rights instruments that underscore that all States have the responsibility to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind, including those related to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

The fifth preambular paragraph highlights the significance of the Universal Declaration of Human Rights and other international human rights instruments and recalls a State's obligation to respect, protect and promote human rights under conditions of equality and non-discrimination.

As pointed out in the introduction section of this guide, one of the salient features of the Agreement is its strong connection to human rights. Access rights have long been safeguarded by international human rights instruments. For example, the rights to information, to public participation and to an effective remedy are included in the 1948 Universal Declaration of Human Rights (articles 7, 8, 19, 20 and 21) and the 1966 International Covenant on Civil and Political Rights (articles 2.3, 14, 19 and 25).

The paragraph refers to the importance of the Universal Declaration of Human Rights, but also recalls other international human rights instruments. The international human rights system is built upon nine core treaties and nine optional protocols. In turn, two of these core treaties (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) together with the Universal Declaration of Human Rights form the International Bill of Human Rights. At the regional level, the American Convention on Human Rights and the Protocol of San Salvador are also worthy of mention.

States have the responsibility to respect, protect and promote human rights. By means of the obligation to respect, States must refrain from interfering with or hindering the enjoyment of human rights. The obligation to protect implies that States shall protect persons against human rights violations. In turn, the obligation to promote or fulfil means that States must take positive action to facilitate the enjoyment of human rights.

Equality and non-discrimination are the backbone of the human rights framework. Included in article 2 of the Universal Declaration of Human Rights and all core human rights treaties (e.g. article 2 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights), this principle requires that, as a rule, human rights be recognized and ensured without any distinction, exclusion or restriction of any kind based on personal conditions. The paragraph offers a non-exhaustive list of conditions, following the language of the Universal Declaration of Human Rights. In that regard, it mentions race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Equality and non-discrimination are later emphasized in article 3 of the Escazú Agreement. It should be noted that equality and non-discrimination apply to all rights.

[6] *Reaffirming also* all the principles of the 1972 Declaration of the United Nations Conference on the Human Environment and of the 1992 Rio Declaration on Environment and Development,

Two of the most significant environmental legal landmarks are the 1972 Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration") and the 1992 Rio Declaration on Environment and Development ("Rio Declaration"). Although neither declaration is legally binding, both

are considered to have laid the institutional and strategic foundations of environmental protection at the international level and to have inspired the multiple multilateral environmental agreements and developments currently in existence. Although these instruments are also mentioned in other parts of the preamble (paragraphs 2 and 7), paragraph 6 reaffirms their importance and all the principles contained therein.

The Stockholm and Rio Declarations are outcomes of the first and second global environmental conferences held under the aegis of the United Nations in 1972 and 1992, respectively. The Stockholm Declaration represented a first attempt at forging a basic understanding of how to preserve and enhance the human environment and increased global awareness of environmental issues dramatically. It comprised 26 principles, some aspirational and others more policy-oriented and normative. Some of the key provisions link environmental protection to the well-being of humans and of future generations, offer guidance for natural resource management, address the issue of economic and social development and set out policies on environmental and resource management.

The Rio Declaration contains 27 principles, among them principle 10 discussed in previous preambular paragraphs. The Declaration emphasizes that human beings are at the centre of concerns for sustainable development and that they are entitled to a healthy and productive life in harmony with nature. Other principles call for the enactment of effective environmental legislation and of national law regarding liability and compensation, the application of the precautionary approach and the "polluter pays" principle, and the undertaking of environmental impact assessment, and introduce the basic premises of environmental cooperation.

[7] *Recalling* the Declaration of the United Nations Conference on the Human Environment, Agenda 21, the Programme for the Further Implementation of Agenda 21, the Declaration of Barbados and the Programme of Action for the Sustainable Development of Small Island Developing States, the Mauritius Declaration and the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, the Johannesburg Declaration on Sustainable Development, the Plan of Implementation of the World Summit on Sustainable Development and the SIDS Accelerated Modalities of Action (SAMOA) Pathway,

This paragraph recalls several international documents and instruments that are considered essential on the path towards sustainable development. These references can be grouped into two categories: (1) instruments of a general scope; and (2) instruments referring to small island developing States (SIDS).

Within the first group, the list refers to the declaration resulting from the United Nations Conference on the Human Environment, adopted in Stockholm in 1972, which was analysed in the previous preambular paragraph. It also mentions Agenda 21 and the related programme for further implementation. Agenda 21 is a programme of action covering different issues that consolidate the principles contained in the 1992 Rio Declaration. The Agenda recognizes more explicitly the interconnections between economic, environmental and social issues and gives particular importance to the participation of non-governmental actors in environmental decision-making processes. Other instruments referred to are the Johannesburg Declaration on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development adopted in 2002. Both build on the earlier 1972 and 1992 declarations, focus on the specific threats to sustainable development and recommit to multilateral action.

The second group of instruments refers to SIDS, which currently comprise 38 Member States and 20 non-member States or associate members of United Nations regional commissions, and which are recognized as a special case given their unique social, economic and environmental vulnerabilities. Since the 1992 United Nations Conference on Environment and Development, there have been several United Nations programmes of action in support of SIDS. These include the 1994 Barbados Programme of Action, the 2005 Mauritius Strategy and the 2014 Samoa Pathway. All three are referenced in this preambular paragraph.

[8] *Recalling also* that, in the outcome document of the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, in 2012, entitled "The future we want", among the many provisions referring to Principle 10 of the Rio Declaration, the Heads of State and Government and high-level representatives acknowledged that democracy, good governance and the rule of law, at the national and international levels, as well as an enabling environment, were essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and eradication of poverty and hunger; underscored that broad public participation and access to information and judicial and administrative proceedings were essential to the promotion of sustainable development; and encouraged action at the regional, national, subnational and local levels to promote access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, as appropriate,

In the eighth preambular paragraph, the Escazú Agreement refers to specific paragraphs of the outcome document of the 2012 United Nations Conference on Sustainable Development (Rio+20), "The future we want", that link access rights to democracy, good governance and the rule of law.

The conference was convened to address two main themes: the green economy in the context of sustainable development and the eradication of poverty, and the institutional framework for sustainable development. Its outcome was "The future we want", endorsed by the General Assembly of the United Nations by means of resolution 66/288. The document contains measures for the implementation of sustainable development and more than 700 voluntary commitments, and for the creation of new partnerships to promote sustainable development.

In addition, the Rio+20 Conference reaffirmed and strengthened the tenets of principle 10 of the Rio Declaration. Several paragraphs of "The future we want" are worth recalling:

1. "10. We acknowledge that democracy, good governance and the rule of law, at the national and international levels, as well as an enabling environment, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger. We reaffirm that, to achieve our sustainable development goals, we need institutions at all levels that are effective, transparent, accountable and democratic."
2. "43. We underscore that broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development. Sustainable development requires the meaningful involvement and active participation of regional, national and subnational legislatures and judiciaries, and all major groups: women, children and youth, indigenous peoples, non-governmental organizations, local authorities, workers and trade unions, business and industry, the scientific and technological community, and farmers, as well as other stakeholders, including local communities, volunteer groups and foundations, migrants and families, as well as older persons and persons with disabilities. In this regard, we agree to work

more closely with the major groups and other stakeholders, and encourage their active participation, as appropriate, in processes that contribute to decision-making, planning and implementation of policies and programmes for sustainable development at all levels."

3. "99. We encourage action at the regional, national, subnational and local levels to promote access to information, public participation and access to justice in environmental matters, as appropriate."

Moreover, it was within the framework of the Rio+20 Conference that the Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean was adopted. As a result, much like the three Rio conventions are considered to stem from the 1992 Earth Summit, the Escazú Agreement can be deemed to have resulted from the 2012 Rio+20 Conference.

[9] *Considering* United Nations General Assembly resolution 70/1 of 25 September 2015, entitled "Transforming our world: the 2030 Agenda for Sustainable Development", by which it adopted a comprehensive, far-reaching and people-centred set of universal and transformative Sustainable Development Goals and targets, and reaffirmed its commitment to achieving sustainable development in its three dimensions —economic, social and environmental— in a balanced and integrated manner,

As noted previously, the Escazú Agreement is based on and directly contributes to the United Nations 2030 Agenda for Sustainable Development. Preambular paragraph 9 establishes a link with United Nations General Assembly resolution 70/1 "Transforming our world: the 2030 Agenda for Sustainable Development" by which it was adopted and reaffirms some of its salient characteristics.

The 2030 Agenda for Sustainable Development was adopted on 25 September 2015. It establishes 17 Sustainable Development Goals (SDGs) and 169 targets, and charts a path for the Member States of the United Nations until 2030.

Some of the features of the SDGs are outlined in the paragraph. These are their comprehensive, far-reaching, people-centred, universal and transformative nature and the fact that they touch upon the three dimensions of sustainable development in a balanced and integrated manner. As a result, SDGs are indivisible and offer a holistic approach to development.

Access rights are a core component of the 2030 Agenda and are mainstreamed in all of the Goals. However, one of them, Goal 16, is particularly relevant as it specifically refers to public access to information and protection of fundamental freedoms, inclusive, participatory and representative decision-making and equal access to justice. In addition, the 2030 Agenda provides for the creation of effective, accountable and transparent institutions and the adoption of non-discriminatory laws and policies for sustainable development.

The interconnection between the Escazú Agreement and the 2030 Agenda has been evident since the early days of the process. In the San José Content adopted in 2014, for example, it was agreed that "the instrument shall allow for the creation of synergies at all levels and shall support implementation of the post-2015 development agenda". The notion of sustainable development is later emphasized in the very objective of the Agreement in article 1.

[10] *Recognizing* the multiculturalism of Latin America and the Caribbean and of their peoples,

Latin America and the Caribbean is culturally and ethnically rich and diverse. Cognizant of this fact, the preamble recognizes the multicultural nature of the region and its peoples.

This multi-ethnic and multicultural composition is reflected in the various peoples that inhabit the region's territory, from indigenous peoples to persons of African descent, migrants and other persons with varied origins and backgrounds that have settled in these lands over the years. Although these persons and groups may sometimes constitute a minority of the population, in other cases they may represent a large share, or even the largest share, of the population.

Latin America's indigenous population is estimated at 60 million people, belonging to more than 800 different indigenous groups and representing 10% of the region's total.[12] According to the latest census figures for each Latin American country and 2020 estimates, 134 million people self-identify as being of African descent, representing around 20.9% of the region's total population.[13] In turn, the migrant population is estimated at over 40 million people, including involuntary and intraregional migrants.[14]

The multicultural character of the region was one of the sources of inspiration to develop an instrument tailored to its realities and singularities. While different traditions, cultures and practices coexist, this multiculturalism was recognized from the outset as one of the salient characteristics and added values of Latin America and the Caribbean. This was reflected in the preparatory documents of the process, such as the 2014 San José Content.

The reference to multiculturalism in the preamble should be interpreted in the broadest sense possible. It refers to the diversity among countries and within them, and may encompass elements such as culture, language, traditions, values, religion and ethnicity. The recognition of the value of multiculturalism points to the positive contribution of this plurality in the framework of the Escazú Agreement, but also to the need for cultural sensitivity, due consideration of multicultural aspects and specific action when needed to ensure this diversity is understood, respected and enhanced.

Several provisions attest to the importance of multiculturalism for the implementation of the Agreement. The use of different languages is considered throughout the text, such as in articles 4.9, 6.6, 7.11, 8.4(d) and 10.2 (e). Moreover, different visions and knowledge are encouraged in appropriate spaces for consultation, under article 7.13.

[11] *Recognizing* also the important work of the public and of human rights defenders in environmental matters for strengthening democracy, access rights and sustainable development and their fundamental contributions in this regard,

The eleventh preambular paragraph underscores the crucial role that the public and human rights defenders in environmental matters play in fostering democracy, access rights and sustainable development.

The interrelated nature of democracy, access rights and sustainable development was already emphasized in other paragraphs of the preamble, such as the fourth paragraph. However, the added value of this

[12] See Economic Commission for Latin America and the Caribbean (ECLAC), *Los pueblos indígenas de América Latina – Abya Yala y la Agenda 2030 para el Desarrollo Sostenible: tensiones y desafíos desde una perspectiva territorial* (LC/TS.2020/47), Santiago, 2020.

[13] See ECLAC, "People of African descent and COVID-19: unveiling structural inequalities in Latin America", *COVID-19 reports*, Santiago, 2021.

[14] See ECLAC, "The impact of COVID-19: an opportunity to reaffirm the central role of migrants' human rights in sustainable development", *COVID-19 reports*, Santiago, 2020.

provision is the recognition of the work and contribution of the public and of human rights defenders in environmental matters to these areas.

The scope of the term public is defined in article 2. In turn, human rights defenders in environmental matters, though not expressly defined, are a well-established category under international human rights law and governed by article 9 of the Agreement referring to persons, groups and organizations that promote and defend human rights in environmental matters. Their work and positive impactful contribution to the protection of human rights and the environment was highlighted by the United Nations Human Rights Council in its resolution 40/11, adopted in March 2019.

This paragraph is also closely connected with the general provision contained in article 4.6, which establishes the obligation to guarantee an enabling environment for the work of persons, associations, organizations or groups that promote environmental protection.

[12] *Aware* of the progress made in international and regional agreements, in domestic legislation and practice on rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters,

The Escazú Agreement builds on past developments relating to environmental access rights. Paragraph 12 underlines the progress achieved so far both at the international and regional levels and in domestic frameworks and practice.

From the inception of the process, the advances in many countries regarding access rights were recognized. In the Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development, it was emphasized that the countries of Latin America and the Caribbean had invested substantial financial and human resources in the implementation of principle 10 and had made considerable progress in the legal recognition of the rights of access.

Some of the developments referenced in the documents of the process include the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters of the United Nations Environment Programme (“Bali Guidelines”), adopted in 2010.

In terms of legally binding instruments, the experience of the Economic Commission for Europe (UNECE) must be mentioned. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998 Aarhus Convention) together with its Protocol on Pollutant Release and Transfer Registers (2003) were the first legally binding instruments to specify the rights of the public and State obligations for the effective application of principle 10.

In the framework of the Organization of American States, several instruments have extensively developed the three access rights contained in principle 10 of the Rio Declaration. These include the American Declaration of the Rights and Duties of Man (articles XVIII, XX and XXIV), the American Convention on Human Rights (articles 2, 8, 13, 23, 24 and 25), the Inter-American Democratic Charter (articles 4 and 6), the Social Charter of the Americas (articles 6, 10 and 21), the Declaration of Principles on Freedom of Expression, the Model Inter-American Law on Access to Public Information and the Inter-American Strategy for the Promotion of Public Participation in Sustainable Development Decision-Making.

At the national level, developments on access rights have been incorporated into studies of the Economic Commission for Latin America and the Caribbean[15] and are available online in the Observatory on Principle 10 in Latin America and the Caribbean.

[13] *Convinced* of the need to promote and strengthen dialogue, cooperation, technical assistance, education and awareness-raising as well as capacity-building for the full exercise of access rights at the international, regional, national, subnational and local levels,

This paragraph reinforces some of the means of implementation of environmental access rights. Awareness-raising, education, cooperation and capacity development are ways through which the full exercise of access rights can be strengthened. Several levels of implementation are mentioned, from international to regional, national, subnational and local.

These references underscore some of the driving forces of the Agreement. On the one hand, they show that the objective is to fully implement access rights. On the other hand, they point to specific means that are considered relevant for implementation.

Dialogue, cooperation, technical assistance, education, awareness-raising and capacity-building are further set out in articles 10 to 12 of the Agreement. They are also the underlying elements of other provisions, such as articles 4.4 (acquisition of knowledge on access rights by the public) and 7.13 (appropriate spaces for consultation on environmental matters). Capacity-building and cooperation are also included from the outset in article 1.

[14] *Resolved* to achieve the full implementation of the access rights provided for under the present Agreement, as well as the creation and strengthening of capacities and cooperation,

Have agreed as follows:

The preamble ends with a powerful statement: the resolve to achieve the full implementation of access rights as well as capacity-building and cooperation, setting the stage for the objective of the Agreement in article 1.

After recognizing the great strides made in the implementation of access rights, the preamble now focuses on the challenges and path ahead, particularly the need to ensure the full realization of access rights along with capacity-building and enhanced cooperation.

As the underlying motivation for the Escazú Agreement, this paragraph makes clear that formally recognizing access rights is an important but insufficient step, and requires that additional efforts be made to fully and effectively implement them on the basis of a cooperative and capacity-building approach. Ultimately, the implementation of access rights is an ongoing process for which the Escazú Agreement emerges as a fundamental supporting tool.

[15] See Economic Commission for Latin America and the Caribbean (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* (LC/TS.2017/83), Santiago, 2018.

B. Article 1 – Objective

The objective of a treaty is of the utmost importance as it sets the overall goals and frames the treaty within the greater body of international law. Treaty interpretation and implementation are to be read at all times through the lens of the objective, thereby offering the general context and underlying reasoning behind the existence and purpose of the treaty.

In the Escazú Agreement, the objective is the first article of the main text of the treaty. It offers both a material and a territorial scope. In this Agreement, article 1 must be read as an expression of the "object and purpose" of the treaty in the sense of article 31 of the Vienna Convention on the Law of Treaties.

> The objective of the present Agreement is to guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, 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.

1. Material scope

The material scope of application can be broken down into a purpose, a means to achieve that purpose and an ultimate aim to which the first two contribute. The Agreement first seeks to guarantee the full and effective implementation of the rights of access to information, public participation and justice. Second, as a means to that end, parties commit to create and strengthen capacities and cooperation. Finally, both the full and effective implementation of access rights and capacity-building and cooperation have as their ultimate aim to contribute to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development.

Full and effective implementation of the access rights implies not only that the parties shall work towards comprehensively achieving all three access rights listed, given their interconnected and inseparable nature, but also that these parties shall provide all necessary means to achieve these rights both in law and in practice. This is also in line with the obligation contained in article 4.3 to adopt all necessary measures to guarantee the implementation of the Agreement.

From the objective, it is also evident that in order to achieve full and effective implementation parties must cooperate and strengthen their capabilities. A capacity-building and cooperation approach is thus essential to fully and effectively implement access rights. Capacity-building is recognized as fundamental for not only the State actors called on to implement, but also for the public, which must be aware of and able to exercise its rights effectively. This dual function for capacity-building is provided for in article 10 of the Agreement which places a duty on the State to build the capacity of the public and State actors.

As the ultimate aim of the Agreement, the objective recognizes that access rights contribute to the right to a healthy environment and to sustainable development. Although each access right has a separate legal status, collectively access rights can contribute to the better protection of the environment and are prerequisites and part of the right to a healthy environment and to sustainable development. Two features included in the article stand out: (i) that everyone has a right to a healthy environment and to sustainable development and (ii) the reference made to present and future generations. Both elements are described

further in other parts of the Agreement. The right to a healthy environment is recognized in the preamble and article 4.1, while the principle of intergenerational equity is included in article 3.

2. Territorial scope

In addition to the material scope, article 1 also offers a territorial scope of application. The objective makes it clear that the obligation to ensure full and effective implementation of access rights is limited to the participating States in Latin America and the Caribbean. The regional character of the Agreement is later emphasized in article 21 on signature, ratification, acceptance, approval and accession that indicates it is open to the countries of Latin America and the Caribbean listed in annex 1 of the Agreement.

C. Article 2 – Definitions

As in any treaty, definitions play a crucial role in interpretation and implementation. Given the wide variety of domestic legal frameworks that may be applicable, definitions offer a common understanding as to what a certain term or concept means so that implementation at the national level can be coherent and consistent among all parties.

Article 2 expressly states that the definitions are intended for the purposes of the Agreement only. At the national level a different term or concept may be used, or certain terminology may have a particular meaning. The Escazú Agreement is not intended to change the use or application of a certain concept or term at the national level, but rather to ensure that the content or substance of the definition included in the Agreement is uniformly applied and respected in all countries. An example can be clearly seen with the term "competent authority", which in the Agreement is defined for the sole purpose of determining the duty bearers in articles 5 and 6 but does not modify the use of that same term at the national level or in other treaties. However, definitions at the national level cannot limit the application of the Agreement.

The Escazú Agreement contains five definitions: "access rights", "competent authority", "environmental information", "public" and "persons or groups in vulnerable situations".

All efforts were made to keep definitions to a minimum, defining only those terms and concepts that at the time of adoption were considered strictly necessary. However, some terms were not defined in article 2 considering their well-established and understood nature but are consistently used throughout the Agreement. This is the case, for example, of the term "public authority".

> For the purposes of the present Agreement:
>
> (a) "Access rights" means the right of access to environmental information, the right of public participation in the environmental decision-making process and the right of access to justice in environmental matters;

The definition of "access rights" is not substantive but rather instrumental. It does not define the content of each right but groups the reference to the three rights regulated by the Agreement avoiding naming them individually each time, for the purposes of economy of language and simplifying the text.

According to the treaty's objective, the three rights are: the right of access to environmental information (articles 5 and 6), the right to public participation in the environmental decision-making process (article 7) and the right to access justice in environmental matters (article 8).

Access rights are human rights, mainly framed within the category of civil and political rights. In this way, they are governed by the International Covenant on Civil and Political Rights (articles 2.3, 14, 19 and 25) and other applicable human rights instruments. These are instrumental rights, insofar as they are essential to achieve good governance, transparency, accountability, and inclusive and participatory public management. In the environmental field, access rights are enshrined in principle 10 of the Rio Declaration on Environment and Development.

(b) "Competent authority" means, for the purposes of articles 5 and 6 of the present Agreement, any public body that exercises the powers, authority and functions for access to information, including independent and autonomous bodies, organizations or entities owned or controlled by the government, whether by virtue of powers granted by the constitution or other laws, and, when appropriate, private organizations that receive public funds or benefits (directly or indirectly) or that perform public functions and services, but only with respect to the public funds or benefits received or to the public functions and services performed;

The definition of "competent authority" only applies to the right of access to environmental information and to its generation and dissemination as provided for in articles 5 and 6. It is used in 5.2(a) and 5.2(b), 5.5., 5.8, 5.9, 5.11, 5.12, 5.13, 5.14, 5.15, 5.17, 6.1, 6.2, 6.5 and 6.6.

As indicated above, the term "competent authority" may not coincide with the terminology used at the national level or in other treaties. The definition of "competent authority" only applies to the Escazú Agreement and does not modify the meaning given to this term in other national or international frameworks.

The main purpose of this definition in the Escazú Agreement is to determine the duty bearers with regard to access to environmental information, encompassing those that are generally included in national freedom of information laws and in other international standards. In that regard, it refers to any institution, body or entity that has been entrusted with powers, authority or functions relating to access to information pursuant to the national legal framework. This may not necessarily correspond only to environmental authorities.

The concept "competent authority" must not be confused with the independent oversight mechanisms referred to in article 5.18. It is also different from the concept of "national competent authorities", which usually refers to those responsible for the national implementation of a treaty.

Following national, regional and international standards and practice, the Escazú Agreement considers two main categories of duty bearers in access to environmental information: (1) public bodies exercising access to information functions when so entrusted by national law; and, when appropriate, (2) private entities, but only insofar as they receive public funds or benefits or perform public functions and services, and only with respect to the public funds or benefits received or to the public functions and services performed.

By including this second category of competent authorities, the Escazú Agreement covers all possible public organizational forms and structures, regardless of whether these public services and functions are provided by the State or through other actors. Aspects of general interest involving the use of public resources, such as public funds or benefits, are also included.

As expressly indicated in the Agreement, the inclusion of private entities is limited to those that receive public funds or benefits or that perform public functions or services. Moreover, the information that shall be accessible is only that environmental information related to those public funds, benefits, functions or services and does not encompass non-environmental information or any other information of the private entity.

The definition of competent authority is different from the term used with regard to other access rights in the Agreement. For public participation, the concept used for the duty bearer is generally "public authority" (see articles 7.6(d), 7.11, 7.14 and 7.16), whereas for access to justice, reference is made to "competent State entities" (see article 8.3(a)). The terms "public authority" and "competent State entity" are not defined in the Agreement.

(c) "Environmental information" means any information that is written, visual, audio, and electronic, or recorded in any other format, regarding the environment and its elements and natural resources, including information related to environmental risks, and any possible adverse impacts affecting or likely to affect the environment and health, as well as to environmental protection and management;

The Agreement incorporates a broad understanding of "environmental information" as any information related to the environment and its elements and natural resources regardless of format. It includes illustrative examples of environmental information, such as that related to environmental risks, adverse environmental and health impacts and environmental protection and management.

Environmental information may be written, visual, aural, electronic or in any other format. This includes hard copy and electronic versions, photographs, illustrations, video and audio recordings, for example. Any other formats not mentioned that exist or may exist would also fall under the definition of environmental information.

Although the term "environment" or "environmental" is not defined, it means any material form relating to the state of the environment, its elements and natural resources. A few examples include air and atmosphere, water, soil, land and biological diversity and its components. National and international frameworks may be of great significance in delimiting environmental information. Some countries may have a list adopted at the national level. Internationally, for example, article 1 of the United Nations Framework Convention on Climate Change (UNFCCC) is valuable to determine climate-related environmental information.[16] In turn, article 2 of the Convention on Biological Diversity (CBD) defines biological diversity.[17]

[16] Article 1 of the UNFCCC establishes the following definitions, among others: (i) "adverse effects of climate change" means changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare; (ii) "climate change" means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods; (iii) "climate system" means the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions; (iv) "emissions" means the release of greenhouse gases and/or their precursors into the atmosphere over a specified area and period of time and (v) "greenhouse gases" means those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation.

[17] Article 2 of the CBD establishes the following definitions, among others: (i) "biological diversity" means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems; (ii) "biological resources" includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity" and (iii)"ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

(d) "Public" means one or more natural or legal persons and the associations, organizations or groups established by those persons, that are nationals or that are subject to the national jurisdiction of the State Party;

Three broad categories of members of the public are included: (1) natural persons (individuals); (2) legal persons (bodies or entities having legal personality) and (3) associations, organizations or groups established by persons in the former categories. In this third group, the terminology used can vary according to national legislation.

The term "public" is used without any qualifier, meaning that it refers to the public in general. However, at times, the Agreement does specify certain categories of public, such as the directly affected public in article 7. These can be considered subcategories within the broader concept of "public", entitled to the same rights as the general public and, additionally, to any other specific rights recognized in the Agreement.

To be considered a member of the public, one of two conditions must be met: (1) must be a national of a State party; or (2) must be subject to a State party's national jurisdiction. These can be alternative or cumulative, meaning a national can also be under the national jurisdiction of the State or not. These requirements were established to ensure a certain degree of proximity to, interest in or relationship with a State party.[18]

The Agreement does not define how nationality is determined, recognized or granted at the national level for natural or legal persons. Usually, the nationality or citizenship of individuals is recognized by way of birth, consanguinity or upon meeting requirements in terms of residence. For legal persons, the place of incorporation is generally used, though other factors may be taken into consideration. For businesses, these may include the nationality of shareholders or of those having active control over the company as well as the place where the core business functions are exercised or employees are located, for example. For organizations and associations, the place of registration or location of the headquarters may be used.

Being subject to national jurisdiction is a familiar legal concept commonly used in international law and is generally understood as being subject to the power, authority, control or laws of a State. Usually, non-nationals in the territory of a State are subject to its national jurisdiction. Foreign legal persons located in the territory of a State are also subject to its national jurisdiction.

(e) "Persons or groups in vulnerable situations" means those persons or groups that face particular difficulties in fully exercising the access rights recognized in the present Agreement, because of circumstances or conditions identified within each Party's national context and in accordance with its international obligations.

Persons or groups in vulnerable situations are those having particular difficulties in exercising their rights fully, owing either to circumstances (temporary) or conditions (inherent or permanent). Vulnerability is contingent upon each party's national context and international obligations.

[18] While human rights and environmental treaties usually refer to "everyone" and "any" or "every person" (i.e. article 2.14 of the Basel Convention), some multilateral environmental agreements also use the term "public", as in the case of the Minamata Convention (article 18) and the Aarhus Convention of the Economic Commission for Europe (article 2.4).

This definition is of particular importance for the Escazú Agreement, one of the hallmarks of which is ensuring equality and non-discrimination so as to leave no one behind. Affirmative and specific measures are provided for this group of persons throughout the Agreement. In general terms, article 4.5 calls on each party to guide and assist particularly those persons or groups in vulnerable situations. Specific references can also be found under each right: access to environmental information (see articles 5.3, 5.4, 5.17 and 6.6); public participation in environmental decision-making processes (see article 7.14) and access to justice in environmental matters (see article 8.5). Article 10.2(e) on capacity-building also broadly encourages parties to develop specific measures for this category of persons.

Although it is common for international human rights law to include specific and affirmative measures for certain groups of persons —particularly those more likely to suffer human rights violations— precisely to ensure they can exercise their rights under conditions of equality and non-discrimination, there is no internationally agreed term common to all. The Agreement opted for the concept "persons or groups in vulnerable situations", in line with common use in international human rights standards.[19]

Instead of including a list of groups or conditions, in order to adapt to the specific context of each party and to be as inclusive and comprehensive as possible, the treaty focused on the "particular difficulties" faced in exercising rights fully. The circumstances or conditions shall be determined in accordance with the national context and a party's international obligations, such as those contained in or derived from international[20] or regional[21] human rights instruments and climate change[22] treaties. Furthermore, the 2030 Agenda also pledges to "leave no one behind", by giving particular attention to the most vulnerable and those furthest behind.[23]

Some of the conditions and circumstances may include poverty, income, illiteracy, disability, age, gender, language, geographical location, race or ethnicity. Applicable rights of indigenous peoples and minority groups shall also be considered. The context and circumstances may also be dynamic and changing,

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[19] See Economic Commission for Latin America and the Caribbean/Office of the United Nations High Commissioner for Human Rights (ECLAC/OHCHR), *Society, rights and the environment: international human rights standards applicable to access to information, public participation and access to justice* (LC/W.712), Santiago, 2016.

[20] These include the nine core United Nations human rights treaties as well as the general comments issued by their respective treaty bodies. By way of example, the Committee on Economic, Social and Cultural Rights has addressed vulnerability in its general comments on cross-cutting issues (e.g. non-discrimination), when detailing specific rights and topics (e.g. health) and with regard to specific at-risk groups (e.g. persons with disabilities, older persons and indigenous peoples).

[21] For example, the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, the Inter-American Convention Against All Forms of Discrimination and Intolerance, the Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities or the Inter-American Convention on Protecting the Human Rights of Older Persons. In the environmental field, the Inter-American Court of Human Rights, in its advisory opinion 23/17, also focuses on persons and groups in vulnerable situations in environmental matters. Among the groups particularly vulnerable to environmental harm are indigenous peoples, children, people living in poverty, minorities and persons with disabilities. There is also a differential impact on women. Communities that depend economically or for their survival on environmental resources are likewise included, as well as coastal and island communities.

[22] The vulnerability of certain groups and communities to climate hazards is well recognized under the UNFCCC through, inter alia, decisions 1/CP.16, paragraph 12; 6/CP.16, paragraph 2c; and 5/CP.17, paragraph 3 of the UNFCCC Conference of the Parties and the preamble and article 7, paragraphs 5 and 9c of the Paris Agreement.

[23] Several Sustainable Development Goals and targets include references to vulnerable groups. For example, "the poor and the vulnerable" under Goal 1; "the poor and people in vulnerable situations" under Goal 2; "persons with disabilities, indigenous peoples and children in vulnerable situations" under Goal 4; or "those in vulnerable situations, women, children, persons with disabilities and older persons" under Goal 11.

meaning that vulnerability experienced at a given time may no longer exist at another (e.g. in the case of disasters and extreme weather events). New categories of vulnerable persons or groups may also emerge over time (e.g. digital illiteracy).

To implement the Escazú Agreement, State parties may find it useful to have in place specific methodologies and approaches to identify persons or groups in vulnerable situations at the national level, including through vulnerability mapping and assessments. Some of the approaches or methods that may be used include: (i) focusing on specific risks, conditions or limitations; (ii) using categorical targeting such as by income, ability, ethnicity, age or gender; (iii) identifying priority regions or areas where persons or groups should be prioritized (e.g. remote areas) or (iv) using community-based targeting or participatory methods, where vulnerable persons can be identified and self-identified.[24] Regardless of the methodology used, validation of assessment results is highly recommended.

D. Article 3 – Principles

Article 3 contains a list of principles that guide the implementation of the Escazú Agreement.

Principles are an essential component of both national and international legal systems and play a fundamental role in the application and interpretation of legal obligations. The term "principles" has different meanings, including the general principles of law recognized as a source of international law in article 38.1.c of the Statute of the International Court of Justice. Principles have been a cornerstone of international environmental law, as demonstrated by their development in soft law instruments and their codification in environmental treaties.

The purpose of principles is threefold. First, they can inspire the legislator or regulator to mandate, guide or direct the duty bearer to act in a certain way. Second, they can assist in interpreting the meaning of a provision, concept or term, or determine the best interpretation to be given if different equally valid alternatives are possible. Third, they serve to integrate provisions and fill legal gaps (gap-filling function), providing coherence and consistency to a legal system.

It is important to distinguish principles from rules. As opposed to latter, principles offer a set of indications and guidelines to interpret and apply treaty provisions but are not as compelling or constraining in that they leave the possibility open to factor in other considerations that may be relevant. Principles are generally not implementable by themselves, only when applying a specific rule or legal obligation.

Treaties commonly include or refer to some principles that help parties to better apply provisions. Article 2 of the Charter of the United Nations is a clear example. In the environmental domain, articles 3 of the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity are worthy of mention. However, treaty law varies in terms of how they are included. In some cases, they are incorporated in a single article, while in others, they are scattered across different provisions. They can also be specifically defined or described in the treaty or may simply be mentioned or referenced, depending on the case.

[24] See, for example, United Nations Framework Convention on Climate Change (UNFCCC), *Considerations regarding vulnerable groups, communities and ecosystems in the context of the national adaptation plans*, Bonn, 2018.

Notwithstanding the inclusion of certain principles in a treaty and the format used to incorporate them, general principles at the national and international levels continue to apply. Furthermore, the express reference to some principles does not preclude the application of other principles that may also be applicable.

Fourteen principles were expressly included in the Escazú Agreement. All are well established and applied in general international law (e.g. principles of good faith and sovereign equality of States), human rights law (e.g. principles of equality and non-discrimination) or environmental law and practice (e.g. preventive and precautionary principles). For that reason, it was agreed to present the principles without definitions or descriptions.

Given their close interrelationship, some principles are grouped under the same letter, such as the principles of equality and non-discrimination in article 3(a) or non-regression and progressive realization in article 3(c). However, no hierarchy is indicated for the fourteen principles and they should all be applied in a comprehensive and consistent manner with each other and with other general principles of law, and in accordance with international and national law and practice. For example, it is well established that the principles of equality and non-discrimination cannot be subject to progressivity but must be applied immediately pursuant to international human rights law.

Other principles that have not been expressly referenced continue to apply to the matters of the Agreement (i.e. principles of legal certainty and fairness, peaceful settlement of disputes or of international cooperation). Some of the principles of article 3 have been subsumed into the substantive content of an obligation. For example, the "principle of transparency" was incorporated as part of the obligation to have "transparent procedures" under article 8.3(b) in access to justice in environmental matters.

In addition, during the negotiation of the treaty, it was made clear that principles would apply not only to the Agreement itself, but also to its national implementation in each State party. The legal value and effects of a principle will thus need to be adapted to the context while keeping its core elements and meaning.

Each Party shall be guided by the following principles in implementing the present Agreement: (a) Principle of equality and principle of non-discrimination;

Equality and non-discrimination constitute basic, immediate and cross-cutting principles in the protection of human rights and, therefore, of access rights.

In accordance with article 1 of the Universal Declaration of Human Rights, all human beings are born free and equal in dignity and rights. Articles 2.1, 3 and 26 of the International Covenant on Civil and Political Rights establish the obligation of States to respect and ensure to all individuals within their territories and subject to their jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other status. In addition, all people are equal before the law and have the right to equal and effective protection, which is why any discrimination on the aforementioned grounds is prohibited.

Although the term "discrimination" is not defined in the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities have delimited the scope of this concept. These treaties coincide in

determining that discrimination entails any distinction, exclusion, restriction or preference based on certain grounds that have the effect or purpose of nullifying or impairing the recognition, enjoyment or exercise of rights and freedoms under conditions of equality and non-discrimination.

In the framework of the Organization of American States, various instruments also contemplate the obligation to promote equality and non-discrimination. Article 1 of the American Convention on Human Rights stipulates that rights and freedoms must be respected and guaranteed to every person subject to the jurisdiction of a State without any discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition. Similar provisions are found in the Protocol of San Salvador, in the Inter-American Democratic Charter, and in the Inter-American Convention Against All Forms of Discrimination and Intolerance.

Therefore, in the implementation of the Agreement, access rights must be exercised on the strict basis of equality and non-discrimination, without being subject to any distinction, exclusion or restriction for any reason, condition or situation. At times, however, achieving said equality and non-discrimination will entail the need to adopt differentiated approaches or positive or affirmative measures towards certain groups or sectors, as the Agreement foresees throughout its text with persons or groups in vulnerable situations.

Although not mentioned explicitly in article 3, it is understood that the principles of equality and non-discrimination fully embrace equal treatment of men and women and gender equality. A specific reference to gender is nonetheless included in paragraph 10 of article 7.

(b) Principle of transparency and principle of accountability;

The second group of principles listed is that of transparency and of accountability. Although developed relatively more recently in comparison to other principles, transparency and accountability are well rooted in modern administrative law and lie at the heart of good governance and effective public management.

Transparency is, in essence, a physical condition, which allows a person to see through an object as light passes through it. The application of the concept to public or private organizations has an almost identical connotation: openness, access to and disclosure of information, operations, structures, processes, services, outcomes, resources, actions and performance of a given entity.

While transparency is closely linked to access to information, it goes a step further in that it requires candidness in State action and enabling public scrutiny thereof. It is therefore not uncommon to find access to information and transparency regulated jointly in the same pieces of legislation.

Transparency is a fundamental prerequisite and driver of accountability. Accountability can be understood as State institutions being accountable for decisions, actions and results; that is, they render an account of certain behaviours and actions, informing and justifying them, providing a reason for their decisions and accepting responsibility for them. Both concepts derive from accounting and fund management and emerged in the field of procurement and public finance, but also went on to inform political science, and they are currently considered key indicators of good governance and public participation. Formal oversight mechanisms and supreme audit institutions play a significant role in enhancing transparency and accountability.

At first glance, transparency may seem to be passive, since it implies allowing access to information on State actions, while accountability would require an active attitude, to provide information on actions of public relevance. However, currently most general environmental laws contain provisions for active transparency, foreseeing the obligation of making certain environmental information available to the public proactively, as well as provisions referring to the establishment of environmental information systems.

The Principles of Effective Governance for Sustainable Development, adopted by the United Nations Committee of Experts on Public Administration[25] and endorsed by the Economic and Social Council (ECOSOC)[26] in 2018, refer to transparency and accountability as enablers of effective public institutions and are an important reference for State policy and practice (see box II.1 below).

Box II.1
United Nations Principles of Effective Governance for Sustainable Development

The Principles of Effective Governance for Sustainable Development, drafted by the United Nations Committee of Experts on Public Administration and endorsed by the Economic and Social Council (ECOSOC), are intended to contribute to building effective, accountable and inclusive institutions at all levels, in the context of the 2030 Agenda for Sustainable Development.

They apply to all public institutions, including the administration of executive and legislative organs, the security and justice sectors, independent constitutional bodies and State corporations.

The Principles are:

- Effectiveness: (i) competence; (ii) sound policymaking; and (iii) collaboration.
- Accountability: (iv) integrity, (v) transparency and (vi) independent oversight.
- Inclusiveness: (vii) leaving no one behind, (viii) non-discrimination, (ix) participation, (x) subsidiarity and (xi) intergenerational equity.

As indicated in the Principles, "nurturing accountability requires civil servants to serve in the public interest, discharging their official duties honestly, fairly and in a manner consistent with soundness of moral principle. […] To ensure accountability and enable public scrutiny, institutions are to be open and candid in the execution of their functions and promote access to information, subject only to the specific and limited exceptions as are provided by law. […] To retain trust in government, oversight agencies are to act according to strictly professional considerations and apart from and unaffected by others."

Source: Committee of Experts on Public Administration, "Report on the seventeenth session (23–27 April 2018)", *Supplement*, No. 24, New York, 2018.

Beyond article 3, references to transparency can also be found in other parts of the Agreement, for example, in the section on access to environmental information (article 5.18) and access to justice in environmental matters (article 8.3(b)). It is also a characteristic that shall be upheld in the bodies of the Agreement, such as the Committee to Support Implementation and Compliance, which shall be of transparent nature according to article 18.2.

[25] See Committee of Experts on Public Administration, "Report on the seventeenth session (23–27 April 2018)", *Supplement*, No. 24, New York, 2018.

[26] See Economic and Social Council (ECOSOC), "Resolution adopted by the Economic and Social Council on 2 July 2018" (E/RES/2018/12), New York, 2018.

(c) Principle of non-regression and principle of progressive realization;

Non-regression and progressive realization are principles traditionally found in the realm of international human rights law. Whereas non-regression applies to all human rights, progressive realization has generally been associated with economic, social and cultural rights.[27]

The principle that once a human right is recognized it cannot be destroyed, restrained or repealed or limited to a greater extent than what is already provided for, constitutes a common baseline of all major international human rights instruments. Article 30 of the Universal Declaration of Human Rights and article 5 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are absolutely clear.

The principle of non-regression regarding a rights-based approach implies not moving backwards with respect to the levels of recognition, protection and implementation previously achieved. A new rule, policy, measure or action must not worsen the pre-existing situation in terms of the scope, breadth and effectiveness of rights and shall not impair or in any way negatively affect the current level of development. Regression may take many forms and may be direct or indirect, explicit or implicit. In considering whether there is regression, the end result or final implications for rights-holders will be essential.

Non-regression has a double purpose. On the one hand, it provides legal certainty for all actors (e.g. most trade agreements include a non-regression clause). On the other hand, it ensures the rights towards future generations are upheld. However, the principle of non-regression does not prevent future reviews, amendments or modifications of the legal regime, nor does it forbid adapting the law to new developments, such as technological and scientific progress, provided that rights are not diminished.

Progressive realization has been applied in particular to economic, social and cultural rights. Pursuant to article 2 of the International Covenant on Economic, Social and Cultural Rights, States undertake to take steps, individually and through international assistance and cooperation, to the maximum of available resources, with a view to achieving progressively the full realization of the rights recognized therein. Similarly, the American Convention on Human Rights (article 26) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) enshrine this principle of progressiveness.

Though offering a certain degree of flexibility, progressive realization must not be misunderstood as inaction and by no means does it deprive obligations of all content. For example, the United Nations Committee on Economic, Social and Cultural Rights has emphasized that the International Covenant on Economic, Social and Cultural Rights requires States to guarantee that rights will be exercised without discrimination, an immediate obligation not subject to progressiveness. Moreover, the Committee has expressly indicated that every State party to the Covenant has an immediate obligation to move as expeditiously and effectively as possible towards the goal of full realization of the rights recognized in the

[27] Article 2.1 of the International Covenant on Economic, Social and Cultural Rights requires States "to take steps" to the maximum of their available resources to achieve progressively the full realization of economic, social and cultural rights. Progressive realization is also found in article 4 of the Convention on the Rights of the Child and article 4.2 of the Convention on the Rights of Persons with Disabilities. See also Committee on Economic, Social and Cultural Rights (CESCR), "CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)", Geneva, 1990.

Covenant, by taking steps that are deliberate, concrete and targeted as clearly as possible towards meeting its obligations. The Committee has also identified a minimum core obligation on the part of States to ensure the satisfaction of, at the least, minimum essential levels of each right, and has stated that even when available resources are demonstrably inadequate, States must still strive to ensure the widest possible enjoyment of rights.[28] In addition, resource constraints do not eliminate the obligation of States to monitor the extent of the realization of the rights and to put in place strategies and policies to promote them.

Following this logic, the Escazú Agreement placed the principle of non-regression together with that of progressive realization, as they are corollaries of one another. While the prohibition of regression acts as a safeguard to maintain the levels of implementation of a right, progressive realization entails a positive obligation to take continued actions to achieve and further develop a right. The Agreement does not indicate the speed at which States shall make progress, but it does provide a sense of movement, of decided and continued improvement, rejecting inaction and regression.

These principles shall be read in conjunction with the general provision in article 4.7, which states that nothing in the Agreement shall limit or repeal other more favourable rights and guarantees set forth, currently or in the future, or prevent a party from granting broader access rights.

In addition to the Escazú Agreement, other international environmental instruments which include non-regression and progressive realization[29] are the outcome document of the United Nations Conference on Sustainable Development (Rio+20) "The future we want",[30] the Paris Agreement,[31] the Cartagena Protocol,[32] the Basel Convention,[33] the Convention on Biological Diversity[34] and the United Nations Convention on the Law of the Sea,[35] among others.

(d) Principle of good faith;

Good faith is one of the foundations and overarching principles on which international law and relations are premised. Encompassing elements of honesty, fairness, fidelity, reasonableness, trust and confidence, good faith imposes a standard of conduct and interpretation.

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[28] See Committee on Economic, Social and Cultural Rights (CESCR), "CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)", Geneva, 1990.

[29] United Nations, *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment. Report of the Secretary-General* (A/73/419), New York, 2018.

[30] Paragraph 20 includes the acknowledgement that, "since 1992, there have been areas of insufficient progress and setbacks in the integration of the three dimensions of sustainable development" and that it is critical not to backtrack from the commitment to the outcome of the United Nations Conference on Environment and Development.

[31] Article 4.3 requires each successive nationally determined contribution to represent a progression with respect to the nationally determined contribution in effect for that party and to reflect the highest possible ambition of that party.

[32] The Protocol empowers States to adopt stricter measures to protect the conservation and sustainable use of biological diversity.

[33] Article 4.11 allows States to impose additional conditions to improve the protection of human health and the environment.

[34] Article 8(k) mandates States to develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.

[35] Articles 208, 209 and 210 on different types of marine pollution stipulate that national laws, regulations and measures shall be no less effective than international standards. According to article 311.6, States parties agree that no amendments shall be made to the basic principle on the common heritage of humanity and that they will not be parties to any agreement contrary to the same.

Although there is no absolute definition of good faith in international law, it is generally understood as a pattern of action, which implies that a State must act faithfully in the fulfilment of all its legal commitments, with the conviction that it is not violating any rights of others and expects others to behave in the same way.

This principle is found in article 2.2 of the Charter of the United Nations, which establishes that all Member States shall fulfil in good faith the obligations assumed by them in accordance with the Charter. It is also central to modern treaty law and is manifested clearly in the concept of *pacta sunt servanda* ("agreements must be observed"). The latter is reflected in article 26 of the Vienna Convention on the Law of Treaties, which states that "every treaty in force is binding upon the parties to it and must be performed by them in good faith". Similarly, good faith is essential in treaty interpretation. Article 31.1 of the Vienna Convention on the Law of Treaties indicates that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

With regard to access rights, good faith must govern both the actions of States and members of the public in the exercise of rights and fulfilment of obligations. It may be of particular importance in the interpretation and application of the provisions of the Agreement on cooperation, such as article 11.

(e) Preventive principle;

Preventing harm to the environment rather than compensating for it after it has already occurred is at the core of international environmental law and constitutes its main rationale. It is widely recognized that the environment is best protected by avoiding damage rather than by repairing it and, as such, since its early days, international environmental law has emphasized prevention as one of its key principles. States thus have the responsibility to prevent transboundary environmental harm resulting from activities within their jurisdiction or control. The particularities of environmental damage make this approach mandatory, considering that environmental harm is often irreversible and restoration of the prior situation is either impossible or costly.

The principle of prevention in environmental law rests on three key aspects: (a) anticipation, creating an obligation to avoid or minimize risks of significant harm before it occurs; (b) due diligence, requiring proactive action and (c) a spatial scope, mandating prevention and cooperation irrespective of the location of harm. In practice, this principle is related to due diligence obligations, in particular the obligation to carry out an environmental impact assessment before carrying out activities that pose a possible risk of environmental damage. It follows that States must also take measures to identify such risks, which is a continuous obligation, reviewing on the basis of the available scientific knowledge.

The well-known Trail Smelter case of 1938 is often mentioned as the origin of this principle. The principle of prevention was also included in principle 21 of the Stockholm Declaration and in principle 2 of the Rio Declaration on Environment and Development. By virtue of the same, States are to exercise their sovereignty over their natural resources in a way that ensures that activities carried out within their jurisdiction or under their control do not harm the environment of other States or of areas beyond any national jurisdiction. Currently, it is admitted that prevention applies as a principle not only to the possible damage that one State may cause to the environment of another, but also that any State has the obligation

to act preventively within its own jurisdiction. States likewise have a duty to cooperate in mitigating transboundary environmental risks and emergencies, through notification, consultation and negotiations.[36]

Most multilateral environmental agreements explicitly refer to the principle of prevention or are based on its rationale. Some examples include the 1982 United Nations Convention on the Law of the Sea (article 194.2), the 1985 Vienna Convention for the Protection of the Ozone Layer (article 2.2(b)), the 1992 Convention on Biological Diversity (article 3) and the United Nations Framework Convention on Climate Change (article 2).

With regard to the Escazú Agreement, the application of this principle implies that access rights must be interpreted and implemented in a way that favours anticipatory action and avoids environmental damage. As an environmental treaty, the Escazú Agreement intends to contribute to the protection of the right to live in a healthy environment (articles 1 and 4.1) and to sustainable development (article 1).

Moreover, given the Agreement's rights-based approach, parties are required to guarantee the right of every person to live in a healthy environment. The preventive principle can also be applied from a human rights perspective, seeking to avoid human rights violations. An example of how this is reflected in the Escazú Agreement can be found under paragraph 3 of article 9, whereby each party must take measures to prevent attacks, threats or intimidations against human rights defenders in environmental matters.

(f) Precautionary principle;

The precautionary principle aims to facilitate an environmental response to situations of uncertainty, mainly of scientific character. This principle implies that when there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. It can be seen as an extension of the preventive principle given that it calls for prevention even in case of uncertainty.

Precaution was incorporated in principle 15 of the Rio Declaration on Environment and Development. This principle reads: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

On the basis of principle 15 of the Rio Declaration on Environment and Development, two elements appear to trigger precaution: risk and scientific uncertainty. There has to be a more or less foreseeable danger which can cause serious or irreversible damage, coupled with the absence of full scientific certainty. However, this principle can only be invoked when there are reasonable grounds for concern. There has to be some scientific basis for predicting the possibility of harmful impacts, although the evidence of this risk need not necessarily be based on the majority expert opinion. The existence of divergent views of scientists may also indicate a state of scientific uncertainty. In addition, there must be a certain assessment of the consequences. Even when States are obliged to apply precaution "widely", this is not unlimited or

[36] See United Nations, *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment. Report of the Secretary-General* (A/73/419), New York, 2018, paragraph 11.

indiscriminate, as they must do so according to their capabilities and through the adoption of "cost-effective" measures.[37]

The application of the precautionary principle does not necessarily mean that an activity or project is strictly banned or prohibited from operating. Rather, it mandates States to identify and foresee risks and take safeguards and preventive measures to avoid harm, even in the absence of full scientific certainty. It may also imply that the proponent is required to demonstrate the absence of harm or possibility thereof. At the same time, the adoption of precautionary measures is subject to the capabilities of each State. What is important in a specific situation is the level of scientific knowledge and technical capability available to a given State in the relevant field, including through international cooperation.

Most multilateral environmental agreements incorporate or are premised on precaution. The 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol are perhaps the best examples of the application of precautionary approach, as they were negotiated and required action before the causal link between ozone depletion and chlorofluorocarbons (CFCs) had been conclusively demonstrated.

This approach is also used in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), where the Berne criteria for listing and de-listing endangered species require de-listing to be approached with caution on the basis of positive scientific evidence. As a result, scientific uncertainty should not be used as a reason for failing to act in the best interests of the conservation of species. The United Nations Framework Convention on Climate Change also indicates in its article 3.3 that: "Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost."

Other examples of the precautionary principle in environmental treaties include articles 10.6 and 11.8 of the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity and articles 1 and 8.7(a) of the 2001 Stockholm Convention on Persistent Organic Pollutants.

(g) Principle of intergenerational equity;

The principle of intergenerational equity has achieved widespread acceptance in the past few decades and has been incorporated into national and international frameworks. This principle reflects the fundamental idea of fairness and equity between generations, based on the notion that each generation holds the planet in common with other generations (past and future), with the obligation to protect it for those to come. It provides the foundation for sustainable development as it ensures that the interests of future generations are not ignored.

The 1972 Stockholm Declaration already recognized the defence of the human environment for future generations as an imperative. Principle 1 states that man "bears a solemn responsibility to protect and improve the environment for present and future generations" while principle 2 stipulates that the natural resources of the earth must be safeguarded for the benefit of present and future generations. This idea was

[37] See United Nations, *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment. Report of the Secretary-General* (A/73/419), New York, 2018, paragraph 12.

later acknowledged in the 1987 Report of the World Commission on Environment and Development: Our Common Future. This document indicated that present generations should exercise fairness in the use and conservation of the environment and natural resources and in so doing meet the needs of the present without compromising the ability of future generations to meet their own needs. In turn, the 1992 Rio Declaration on Environment and Development makes explicit reference to the interests of future generations, stating in its principle 3 that "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations".

References to future generations also appear in the 1992 United Nations Framework Convention on Climate Change and the 1992 Convention on Biological Diversity. The preamble of the 2015 Paris Agreement likewise recognizes that climate change is a common concern of humanity and that in the adoption of measures, parties must consider their respective obligations on the basis of intergenerational equity. In that same vein, the principle underlies the entire 2030 Agenda on Sustainable Development.

As noted in the 2013 report of the Secretary-General of the United Nations on intergenerational solidarity and the needs of future generations, the fundamental principle of intergenerational equity is conceived to mean that "each generation should bequeath to its successors a planet in at least as good a condition as that generation received it". As noted in the report, this general principle can be divided into three components: conservation of options, conservation of quality and conservation of access. Conservation of options means that "each generation should be required to conserve the diversity of the natural and cultural resource base so that it does not unduly restrict the options available to future generations for solving their problems and satisfying their own values". Conservation of quality is defined as each generation's obligation "to maintain the quality of the planet so that it is passed on in no worse a condition than that in which it was received". Lastly, conservation of access is defined as the provision of "equitable rights of access to the legacy of past generations".

Apart from article 3, the Escazú Agreement also incorporates intergenerational equity implicitly in its objective. As stated in article 1, the ultimate aim of the treaty is to contribute to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development.

(h) Principle of maximum disclosure;

The principle of maximum disclosure is generally understood to mean that all information held by public bodies is presumed to be public and accessible and that this presumption may be overridden only in very limited circumstances. This implies that secrecy is only allowed when the necessity and legitimacy of confidentiality are proved. This principle captures the essence of freedom of information and is explicitly stated as an objective in a number of national legal frameworks.

The Model Inter-American Law on Access to Public Information presents one of the clearest formulations of the scope and purpose of the principle. In addition to reaffirming that the right of access to information is based on the principle of maximum disclosure, it indicates that "this Law establishes a broad right of access to information, in possession, custody or control of any public authority, based on the principle of maximum disclosure, so that all information held by public bodies is complete, timely and accessible, subject to a clear and narrow regime of exceptions set out in law that are legitimate and strictly necessary in a democratic society based on the standards and jurisprudence of the Inter-American system."

As a result, the principle of maximum disclosure mandates that publicity shall be the norm and that disclosure shall be favoured at all times. It also follows that the set of causes for refusal to grant access shall be narrow, clear and limited. Non-disclosure must be analysed and justified on a case-by-case basis and exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm surpasses the overall public interest in having access to the information.

The concepts of "maximum publicity" and "maximum disclosure" are sometimes used interchangeably. Both terms point in the same direction. However, "publicity" indicates a sense of proactivity in making the information public and disseminating it, thus enriching active transparency.

Maximum disclosure lies at the heart of articles 5 and 6 of the Escazú Agreement. Article 5.1 explicitly calls on each party to ensure the public's right of access to environmental information "in accordance with the principle of maximum disclosure". The Agreement's provisions also reflect the essence of this principle, when establishing that exception regimes shall take into account each party's human rights obligations and favour the disclosure of information. The reasons for refusal shall likewise be legally established in advance, be clearly defined and regulated, taking into account the public interest and interpreted restrictively.

However, maximum disclosure may extend beyond articles 5 and 6. For example, it should also apply with regard to the information provided during decision-making processes on environmental matters, so as to facilitate the right to participation, and to the means to publicize the right of access to justice and corresponding procedures. Furthermore, it could imply the presumption that meetings with public authorities and bodies shall be preferably open and unrestricted.

(i) Principle of permanent sovereignty of States over their natural resources;

The principle of permanent sovereignty of States over natural resources is a consequence of the seminal principle of equal sovereignty of States and has been widely reflected in international law. While this principle appeared for the first time in the framework of international economic law, nowadays it is also a key component of international environmental law. It was developed in conjunction with another principle, the duty to cause no harm to other States, which was reviewed under principle (e) above. Although the two may seem contradictory, they are in fact complementary and a consequence of one another.

State sovereignty and sovereign equality imply that States have sovereign rights over their natural resources, meaning not only exercising ownership, but also power over what, when and how to manage and exploit them. Rooted in the concept of territorial sovereignty, this principle was emphasized by United Nations General Assembly resolution 1803 (XVII) of 1962.

However, sovereignty is not absolute and is curtailed by the duty of care, due diligence and the obligation not to cause harm to the environment of another State and to areas beyond national jurisdiction. This correlation between rights and duties was later made patent in principle 21 of the 1972 Stockholm Declaration and principle 2 of the 1992 Rio Declaration on Environment and Development. As reflected in these Declarations, States have, in accordance with the Charter of the United Nations and international law principles, the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

Given that it is a principle that governs relations between States, when it comes to shared resources (which are not entirely within the jurisdiction of a single State) the obligation to use the resource in a fair and harmonious manner becomes imperative. This obligation is mainly related to cooperation based on an information system and prior consultation and notification to achieve the optimal use of said resources without causing harm or hindering the legitimate interests of other States.

In those areas where resources are beyond the limits of national jurisdiction, such as the high seas or the area of seabed and ocean floor thereof, the principle of permanent sovereignty of States over their natural resources does not apply. High seas and areas of seabed and ocean floor are subject to different legal regimes and their legal nature is also different: high seas are a space of free access and common use by any State, while areas of seabed or ocean floor are characterized as the common heritage of humanity. However, neither the high seas nor areas of seabed or ocean floor can be subject to the sovereignty of any State. Consequently, States have an enhanced obligation to cooperate in order not to harm the natural resources found in those maritime areas and to avoid their unlawful appropriation.

(j) Principle of sovereign equality of States;

The sovereign equality of States lies at the heart of contemporary public international law. The notion that all States are equal simply because of their status dates back to the sixteenth and seventeenth centuries, but has more recently been incorporated as a foundational principle of the United Nations. Article 2.1 of the Charter of the United Nations expressly states that “the Organization is based on the principle of sovereign equality of all its Members”. This notion is reiterated in United Nations General Assembly resolution 2625 (XXV) of 1970, entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”.

State sovereignty is a political and legal concept, which serves to determine the freedoms, prerogatives, and powers of States, but also their responsibilities. In turn, sovereign equality can be considered mostly juridical in nature, meaning that all States are equal under international law regardless of any other consideration (e.g. territorial size, population, economic development or military power).

This idea of sovereignty has been extremely useful to explain international relations between sovereign and formally equal States and serves as the underlying basis of other fundamental principles such as the prohibition of intervention in the internal affairs of States or the sovereign immunities of States and their officials.

Although the Charter of the United Nations does not define the principle, certain key elements were outlined during its preparatory work at the San Francisco Conference and later emphasized in United Nations General Assembly resolution 2625 (XXV). In the latter, it was expressed that all States enjoy sovereign equality and, as such, they have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality was found to include the following elements: (a) States are juridically equal; (b) each State enjoys the rights inherent in full sovereignty; (c) each State has the duty to respect the personality of other States; (d) the territorial integrity and political independence of the State are inviolable; (e) each State has the right freely to choose and develop its political, social, economic and cultural systems and (f) each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

The inclusion of the principle of sovereign equality of the States in the Escazú Agreement not only reiterates the validity of this principle in the relations between parties, but also provides guidance in the interpretation and application of the Agreement as an international legal instrument, especially in terms of the organization and operation of its governance and cooperation mechanisms. The right to one vote of each party set out under article 16 is an example.

(k) Principle of *pro persona*

The *pro persona* or *pro homine* principle is a hermeneutic criterion in international human rights law calling for the interpretation that most favours the person, both in terms of rights and guarantees. According to this principle, human rights norms shall be interpreted as extensively as possible when recognizing rights and as restrictively as possible when imposing limits on their enjoyment. Furthermore, in case of conflicts of norms, preference should be given to the one that better protects human rights.

Thus, it can be defined as a guideline that provides for an interpretative and normative order of preference in case there are different equally valid and possible options, seeking to ensure that the result is the one that best protects the person.

The principle is manifested in two dimensions: interpretative and normative. It therefore opts for a priority interpretation or a preferred application of a norm when faced with different alternatives. In cases of interpretive doubts and whenever there are different possible ways of interpretation, the principle mandates that the most extensive interpretation shall be opted for except for restrictions or limits on rights, which shall be interpreted as narrowly as possible. As for a conflict of norms, the *pro persona* principle indicates that priority shall be given to the applicable norm that better guarantees human rights, whether by the direct application of that norm (if it was in accordance with priority rules) or by the interpretation of any norm in conjunction with and in accordance with the norm most favourable to human rights.

Widely applied in the Inter-American system of human rights, the *pro persona* principle has also been extensively recognized under the United Nations human rights corpus. It is often considered derived from articles 5 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In the Americas, article 29 of the American Convention on Human Rights serves as its normative basis.

For specific references to the *pro persona* principle in international human rights treaties, see box II.2.

The inclusion of the *pro persona* principle in the Escazú Agreement is consistent with its rights-based approach. It is also expressly reflected in some of its provisions, for example in paragraphs 7 and 8 of article 4. The normative dimension of the *pro persona* principle is expressed when it is stated that no provision in the Escazú Agreement shall limit or repeal more favourable rights and guarantees that may be found at present or in the future in national legislation or applicable international agreements. Furthermore, in terms of interpretation, each party shall seek to adopt the most favourable interpretation for the full enjoyment of access rights. This principle has practical applications, for example, assisting parties to determine the scope of some definitions, such as “public” and “persons or groups in vulnerable situations” in case of doubt or in borderline cases. The principle may also be of extreme relevance when there is a concurrence of norms, such as equally applicable treaties or domestic rules on the same subject matter, where preference should be given to the most protective norm for the rights of the person.

Box II.2
Articles referring to the *pro persona* principle in international human rights treaties

International Covenant on Civil and Political Rights, article 5:
1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

International Covenant on Economic, Social and Cultural Rights, article 5:
1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.
2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

American Convention on Human Rights, article 29. Restrictions Regarding Interpretation
No provision of this Convention shall be interpreted as:
a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of the the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the American Convention on Human Rights.

E. Article 4 – General provisions

As previously noted, the Escazú Agreement is structured around five pillars (access to information, public participation, access to justice, human rights defenders in environmental matters, and capacity-building and cooperation). However, certain provisions apply to the Agreement as a whole. These are included in article 4 under the title “general provisions”.

These provisions touch upon diverse matters. They range from the guarantee of the right to live in a healthy environment, the obligation to take all necessary measures and to provide guidance and assistance to the public for the free exercise of rights, the establishment of an enabling environment for environmental protection and the encouragement of new information and communications technologies.

Table II.1 provides an overview of the main obligations contained in article 4 and practical guidance for its implementation.

Table II.1
Main obligations contained in article 4 of the Escazú Agreement and implementation guidance

Provision	Obligation	Implementation guidance
Paragraph 1	Guarantee the right of every person to live in a healthy environment and other human rights	- Explicit recognition of the right - Interdependence between human rights and the environment - For other human rights, need of universal recognition and relation with the Agreement
Paragraph 2	Ensure the free exercise of rights	- No undue interference or reprisal or fear thereof - Entails negative and positive obligations - Refers to all rights recognized in the Agreement (not limited to access rights)
Paragraph 3	Adopt the necessary measures to guarantee implementation	- Focus on full and effective implementation (article 1) - Wide array of measures that can be taken - Compatibility, consistency and enforcement
Paragraph 4	Provide the public with information to increase knowledge on access rights	- Complementary to the pillar on capacity-building and cooperation - Proactiveness of each party - Tailored to target audience
Paragraph 5	Ensure guidance and assistance are provided to the public	- Objective is to facilitate the exercise of access rights - Variety of ways to discharge the obligation - Focus on persons or groups in vulnerable situations
Paragraph 6	Guarantee an enabling environment for environmental protection	- Link with article 9 - Emphasis on recognition and protection
Paragraph 7	The Agreement is a floor not a ceiling	- Right to maintain more favourable existing measures - Right to introduce more favourable measures
Paragraph 8	Seek to adopt the most favourable interpretation	- Link to the *pro persona* principle - Obligation of effort, not of result
Paragraph 9	Encourage the use of new information and communications technologies	- Reference to open data - Different languages used in the country - Shall not constrain or result in discrimination
Paragraph 10	Promote knowledge of the provisions of the Agreement in other international forums	- Recommendatory language - Forums related to environmental matters - Respect of the rules of each forum

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of the Escazú Agreement.

1. Each Party shall guarantee the right of every person to live in a healthy environment and any other universally-recognized human right related to the present Agreement.

By means of the first general provision of the Escazú Agreement, each party commits to guaranteeing the right to a healthy environment and any other universally-recognized human right related to the Agreement. Although this right can be considered the ultimate aim of the treaty as per its objective, this provision builds upon it by explicitly recognizing it as a right and complementing it with the reference to other related human rights. Through the inclusion of this paragraph, parties clearly acknowledged that the human right to a healthy environment is both a premise for the exercise of access rights and closely related with other human rights, emphasizing their interconnectedness.

As was previously indicated, human rights and the environment are interdependent. The full enjoyment of human rights, including the rights to life, the highest attainable standard of health, an adequate standard of living, adequate food, water and development, depend on a healthy, safe, clean and sustainable environment. In turn, the right to a healthy environment has also been recognized as a right in itself. The latter entails both procedural and substantive obligations for States. In addition to the procedural duties, such as the rights of access to information, participation and justice, and environmental impact assessments, States shall take effective measures to ensure the protection and sustainable use of the environment and prevent environmental harm. Even if it may not always be possible to prevent all harm, due diligence to prevent it or reduce it as much as possible is imperative. The right to a healthy environment has both a collective and an individual dimension. Collectively, it safeguards a public good of universal value both for present and future generations. Its collective dimension is also fundamental for certain groups, such as indigenous peoples. Individually, it enables individuals to realize all their human rights.

The use of the verb “guarantee” in the paragraph sends a powerful message from the outset, as it represents mandatory language. Therefore, strict and unqualified compliance is expected of States parties. To a large extent, parties will meet this obligation by implementing access rights in the Agreement, the procedural component to the right to a healthy environment. However, the substantive content of the right must also be ensured.

It should be noted that the recognition of the right to a healthy environment and its linkage with human rights in the Escazú Agreement is not novel. At the regional level, article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, or Protocol of San Salvador, recognizes that everyone has the right to live in a healthy environment and to have access to basic public services and that States shall promote the protection, preservation, and improvement of the environment. The Inter-American Court of Human Rights, in its advisory opinion 23-17, widely analyses the right to a healthy environment in the framework of the American Convention on Human Rights. Similarly, the vast majority of the national legal frameworks in the region also safeguard the right to the environment, mostly at the constitutional level. Some also include the concurrent duty to preserve the environment.

Another key component of this provision is the link between the right to a healthy environment and other human rights. States are required to guarantee “any other universally-recognized human right” related to the Agreement. Universal recognition may stem from treaties, declarations or resolutions. Examples of declarations include the Universal Declaration of Human Rights or the American Declaration of the Rights and Duties of Man. Examples of resolutions recognizing human rights include United Nations General Assembly Resolution 64/292 of 2010 formally recognizing the human right to water and sanitation. The

requirement for universal endorsement implies that all countries of Latin America and the Caribbean that may be parties to the Agreement have recognized these rights. Even if the specific human rights to which this section refers are not listed, the scope is limited by the need of universal recognition and the relation to the Agreement. Examples of universally-recognized human rights that could fall under this category because of their proximity with the Agreement include the right to life, the right to liberty and security, the rights of freedom of expression and peaceful assembly and association, and the right to equality and non-discrimination or to equal protection of the law.

2. Each Party shall ensure that the rights recognized in the present Agreement are freely exercised.

Paragraph 2 captures one of the preconditions for the full enjoyment of rights: the possibility to freely exercise them. Recognition of rights or guarantees is meaningless if persons are unable to wilfully exercise them or access enforcement mechanisms without fear.

The free exercise of rights refers to their enjoyment without fear, undue interference or reprisal. This includes all forms of coercion, threats, or unlawful and illegitimate limitations to the exercise of rights, but also the absence of retaliation, penalization, attacks or harassment for exercising them.

Both a negative and a positive obligation are expected of States. On the one hand, parties shall abstain from unduly curtailing or interfering with the exercise of rights. International human rights law establishes, for example, that economic, social and cultural rights may only be subject to "such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society" (article 4 of the International Covenant on Economic, Social and Cultural Rights). On the other hand, States shall also protect individuals and groups from rights abuses, take proactive measures to realize rights and create enabling environments where rights can be freely exercised. This provision also encompasses so-called whistle-blower protections, aiming to protect those that use oversight and compliance mechanisms to uphold their rights and the rights of others. Furthermore, there is a clear link with paragraph 6 of article 4, calling on each party to guarantee an enabling environment to promote environmental protection.

The paragraph is broad in scope in that it is not limited to access rights but refers to all the rights recognized in the Agreement. Among the rights recognized by the Agreement are the right to live in a healthy environment (articles 1 and 4.1) and to sustainable development (article 1). Consequently, it encompasses both the rights of duty bearers and rights-holders and extends also to rights of parties that result from the Agreement (e.g. the right to vote under article 16).

Article 9 develops the free exercise of rights specifically for human rights defenders in environmental matters. It requires each party to guarantee a safe and enabling environment to allow human rights defenders in environmental matters to act free from threat, restriction and insecurity and to take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations these human rights defenders may suffer while exercising the rights set out in the Agreement.

3. Each Party shall adopt the necessary measures, of a legislative, regulatory, administrative or any other nature, in the framework of its domestic provisions, to guarantee the implementation of the provisions of the present Agreement.

A treaty, as a binding legal instrument, establishes international obligations between States parties. Article 26 of the Vienna Convention on the Law of Treaties further establishes that parties must meet their obligations in good faith and article 27 establishes that no party may invoke the provisions of its own domestic law to justify its failure to comply with a treaty obligation.

This paragraph sets out the overall obligation of parties to implement the provisions of the Agreement by taking all necessary measures in their national frameworks. Closely related to article 1, this provision emphasizes the need for taking concrete steps to achieve the treaty's aims.

Several ideas can be derived from the text of this provision. First, it implies that each party shall proactively take measures to fulfil its obligations under the Agreement. As previously indicated, the Agreement's focus on implementation means that a mere recognition of rights is insufficient to discharge a party's obligation and requires ensuring that such rights are fully and effectively realized on the ground. Even if a party considers the Agreement to have direct applicability and to be of a higher legal hierarchy than national law, any necessary measures to implement it must be adopted.

Second, while there is no favoured model for implementing the provisions of the Agreement, the "necessary" implementation measures shall be adopted. Apart from one provision which specifically requires the adoption of legal measures,[38] the Agreement offers a wide array of possibilities that can be chosen based on each party's context and situation. However, it mentions by way of example legislative, regulatory and administrative measures or measures of any other nature. Policy, monitoring and oversight, budgetary and financial or capacity-building, awareness-raising and educational measures would appear to fall under this last broad category. In determining which measures are necessary, States must bear in mind not only the objective of the Agreement, but also its principles, such as those of equality and non-discrimination, non-regression and progressive realization, transparency and accountability and maximum disclosure. Parties may, therefore, be expected to explain or justify why a certain measure was taken and why it is considered necessary for achieving its ultimate purpose. Nonetheless, measures shall be consistent with the Agreement and also among themselves.

In determining what is necessary and which type of measure to adopt, it may be useful for parties to undertake an assessment of their laws, regulations and practices and match them against the obligations and standards of the Agreement. This review may then lead to a national implementation plan which identifies baselines, gaps, challenges, opportunities and priorities, responsible entities, time frames and resource allocation. Even if it is up to States to take implementation measures, the nature of the rights and obligations requires a coordinated approach with all interested stakeholders.

Third, the reference "in the framework of its domestic provisions" indicates the corpus in which such measures shall be taken. Even if parties are generally allowed some flexibility in their methods, their domestic provisions offer the framework for implementation. As a result, if in domestic law the implementation of certain provisions requires a specific form, format or hierarchy, then the latter will determine the measure taken provided it is not incompatible with the Agreement.

Compatibility and consistency are perhaps some of the most important concepts to bear in mind when analysing implementation measures. On the one hand, parties shall eliminate all norms and practices that

[38] Article 5.8 requires the reasons for refusal of access to environmental information to be legally established in advance, thus mandating that they be contained in legal measures.

violate the rights contained in the Agreement. On the other hand, they shall favour norms and practices that strengthen implementation and compliance. Consequently, parties must ensure that all relevant legislation is clear and consistent with the Agreement, but also avoid inconsistent application and interpretation of that legislation. The principle of non-regression must also be borne in mind. Moreover, implementation must be accompanied with proper enforcement measures. Ensuring that the domestic framework is fully compatible with the Agreement requires comprehensive and ongoing reviews.

Lastly, other provisions in the Agreement directly contribute to implementation. Capacity-building and cooperation provisions aim to improve the capacities to implement the Agreement. Article 13, for example, refers to the provision of resources for national implementation to extent of each party's ability and national priorities. Article 15.5(c) also requires parties to inform the Conference of the Parties of the measures adopted to implement the Agreement. Meanwhile, article 18 establishes the Committee to Support Implementation and Compliance that aims to promote the implementation of the Agreement and support parties in that regard.

4. With the aim of contributing to the effective application of the present Agreement, each Party shall provide the public with information to facilitate the acquisition of knowledge on access rights.

Paragraph 4 acknowledges the importance of the public being informed and educated to be able to fully exercise access rights. Complementary to the pillar on capacity-building and cooperation of articles 10 and 11, this paragraph focuses on the provision of information for the purposes of acquiring knowledge on access to environmental information, public participation in environmental decision-making and access to justice in environmental matters.

The Agreement leaves each party ample room to meet this obligation. The nature of the obligation implies that each party shall be proactive in making available information to the public that enhances their skills and knowledge on access rights. The information provided may relate to basic terms and conditions for the realization of each right, and to processes and procedures and examples of best practices and lessons learned. This information would need to be tailored to the target audience and be accessible, adequate and understandable for members of the public. Particular attention may need to be paid to persons and groups in vulnerable situations.

The overall aim of this provision is to contribute to the effective application of the Agreement; hence the importance of reviewing the paragraph in a holistic manner from the lens of the treaty's objective under article 1.

5. Each Party shall ensure that guidance and assistance is provided to the public —particularly those persons or groups in vulnerable situations— in order to facilitate the exercise of their access rights.

One of the salient features of the Escazú Agreement is its focus on leaving no one behind. Recognizing that the public, and particularly persons or groups in vulnerable situations, may require support to fully exercise their rights, the Agreement stipulates that each party must guide and assist rights-holders in realizing them.

This paragraph builds on the previous commitment to provide the public with information to facilitate the acquisition of knowledge of access rights. Both informing and guiding the public constitute core traditional functions of the State and are usually performed by civil servants and governmental front offices.

Parties may discharge this obligation in several ways. They may designate officials specifically responsible for providing such assistance and guidance on access rights regardless of the matter in question, or they may have different responsible staff depending on the subject. The official handling a particular case may also be mandated to support members of the public when so required. Guidance and assistance may likewise be provided through outreach and communication materials and electronic means (e.g. hotlines, remote assistance or virtual assistants), although care should be taken to avoid any constraint for members of the public that are unable to use such systems. As such, they can provide other means of guidance and assistance.

In addition, the paragraph emphasizes the special attention that each party must pay to persons and groups in vulnerable situations defined in article 2. Materializing this commitment, and in alignment with the principles of equality and non-discrimination, the Agreement contains particular provisions to support persons and groups in vulnerable situations under each pillar, such as articles 5.3, 5.4, 5.17, 6.6, 7.14, 8.5 and 10.2(e).

6. Each Party shall guarantee an enabling environment for the work of persons, associations, organizations or groups that promote environmental protection, by recognizing and protecting them.

Guaranteeing an enabling environment to promote environmental protection is another general provision of the Escazú Agreement. Paragraph 6 specifies that this applies to persons, associations, organizations or groups and that such an environment is fostered through their recognition and protection.

The specific attention granted to persons and groups that defend the environment is reinforced not only in this paragraph but also in the preamble (paragraph 11) that recognizes the important work of the public and of human rights defenders in environmental matters and in article 9 that deals with human rights defenders in environmental matters.

Several elements are considered to contribute to an enabling environment for environmental protection. These include having a solid, clear and consistent legal framework in line with international standards safeguarding rights and freedoms; transparency, accountability and access to information; mechanisms and processes that enable the meaningful participation of the public; effective access to justice and minimum guarantees that protect rights. An enabling environment is also one that allows persons and groups to operate free from threats, harassment, intimidation and violence. A more detailed analysis of the concept can be found in the analysis of article 9.

Recognition and protection are mentioned as also being conducive to an enabling environment. Recognizing persons and groups defending the environment contributes to society, and ensuring that their actions are not criminalized, delegitimized or stigmatized is essential. This acknowledgement of their value and worth can occur through legal, political or symbolic recognition. Parties may recognize their specific legal personality, empower them as key stakeholders and encourage their active involvement in the conduct of public affairs, as well as show appreciation for and foster a positive image of them and of their work in the public domain. This may include public statements, awards and recognitions or other support mechanisms. Recognition can also be accompanied with appropriate training programmes at different levels as well as media and awareness-raising campaigns aiming to increase knowledge and understanding of the contributions. In turn, protection implies taking measures to safeguard individuals and groups from human rights violations. Protection measures include different mechanisms to prevent harm to the life, integrity and safety of persons, as well as early warning systems.

7. No provision in the present Agreement shall limit or repeal other more favourable rights and guarantees set forth, at present or in the future, in the legislation of a State Party or in any other international agreement to which a State is party, or prevent a State Party from granting broader access to environmental information, public participation in the environmental decision-making process and justice in environmental matters.

Paragraph 7 captures two of the main foundational understandings of the Escazú Agreement: (1) countries have made great progress but are at different levels of implementation of environmental access rights and (2) the instrument is "a floor, not a ceiling".

Since the beginning of the process, countries of the region have admitted that the full implementation of access rights requires the corresponding level of ambition. Thus, in the Lima Vision (2013) it was recognized that, regardless of the measures agreed to strengthen the full application of access rights, nothing would prevent countries from adopting additional measures that would guarantee even broader access to information, participation and justice in environmental matters.

This provision ensures that all countries meet certain minimum requirements, but does not preclude them from granting more favourable rights and guarantees. This broader access may be granted before or after a State becomes a party. Furthermore, they may be recognized through national or international instruments. What is important is that the most favourable standards are applied. The foregoing is consistent with the principle of non-regression and progressive realization as well as with the *pro persona* principle.

Some provisions of the Agreement expressly follow this approach. Paragraph 12 of article 5, for example, provides the baseline of 30 business days from the date of receipt to respond to an access to information request. However, this period will be less if so stipulated in domestic legislation, meaning that any country with a shorter time frame will continue to apply it.

8. Each Party shall seek to adopt the most favourable interpretation for the full enjoyment of and respect for the access rights when implementing the present Agreement.

In line with the human rights-based approach of the Escazú Agreement, paragraph 8 of this article strengthens the principle of "most favourable interpretation". When faced with different interpretative alternatives in the implementation of the Agreement, parties and duty bearers shall seek to adopt that which favours mostly the full realization of access rights.

As seen under article 3, this interpretative criterion lies at the heart of the *pro persona* principle which gives preference to the meaning that is most favourable to the protection of the rights of the person (or less restrictive in cases of limits or exceptions to the right).

In this paragraph, however, the priority given to the most favourable interpretation is not absolute, as the obligation is to "seek" its adoption. Accordingly, it is an obligation of effort as opposed to result. The authority or duty bearer may thus need to provide a reasoned explanation of the interpretation given and, should it be the case, why it opted for the one which did not mostly favour the protection and fulfilment of rights. In other words, explain how it used its best endeavours and "sought to adopt" the most favourable interpretation.

9. For the implementation of the present Agreement, each Party shall encourage the use of new information and communications technologies, such as open data, in the different languages used in the country, as appropriate. In no circumstances shall the use of electronic media constrain or result in discrimination against the public.

Cognizant of technological breakthroughs and their importance for accelerating progress on environmental access rights, paragraph 9 mandates each party to encourage the use of new information and communications technologies as appropriate.

Information and communications technologies (ICTs) is a broad concept that encompasses various devices, technologies and applications, such as traditional means of communication like radio, television or landline telephones but also more relatively recent breakthroughs such as the Internet, wireless and broadband networks, computers, satellite services, smartphones and other information technology hardware, software, middleware, social networking and other services and applications that allow a user to access, send, retrieve and store information in digital form. It is a term that must be understood under context-specific parameters (what is available, to whom and where) and its scope is dynamic or evolving in nature, as technologies are constantly changing and innovations emerging.

The benefits of applying ICTs to environmental access rights are beyond doubt. They not only facilitate the flow of information between States and societies, but also allow the significant improvement of public management, the provision of basic services and public engagement. Their multiplier effects range from enhancing transparency and openness, to improving speed, scale, quality, accuracy, responsiveness and efficiency of services, reducing time and costs both for governments and for the public. For that reason, the use of these ICTs and e-government for environmental management have increased.

The Escazú Agreement recognizes the importance of ICTs but does not make them mandatory: it only encourages their use, leaving it up to each party to determine the best way to do so, when and as appropriate. As a general provision, it applies to all the pillars of the Agreement, but may be of particular importance in the generation and dissemination of environmental information, as well as in offering complementary platforms and means for public participation in decision-making processes on environmental matters. The obligation to promote the use of ICTs is also consistent with the principles of transparency, accountability and maximum disclosure.

The reference to “open data” is worthy of mention. Included as example of an ICT that can be encouraged by parties, it offers tremendous potential to enhance the implementation of environmental access rights. Open data are considered those which are freely available online for anyone to access, use and reuse for any purpose. According to Open Knowledge International’s Open Definition, “open data is data that can be freely used, re-used and redistributed by anyone –subject only, at most, to the requirement to attribute and share alike.” This Open Definition has four requirements: (1) open license or status (the work must be in the public domain or provided under an open license); (2) access (the work must be provided as a whole and at no more than a reasonable one-time reproduction cost and should be downloadable via the Internet without charge); (3) machine readability (the work must be provided in a form readily processable by a computer and where the individual elements of the work can be easily accessed and modified); and (4) open format (the work must be provided in a format which places no restrictions, monetary or otherwise, upon its use and can be fully processed with at least one free or open-source software tool). Initiatives such as the Open Government Partnership also offer relevant frameworks to develop open data for public policies.

The provision also indicates that the new ICTs shall be encouraged in the different languages used in the country, as appropriate. This mention is consistent with the rest of the Agreement, particularly the recognition of the region's multiculturalism in the preamble as well as articles 6.6, 7.11, 8.4(d) and 10.2(e). The use of ICTs is directly correlated with the building of capacities of duty bearers and rights-holders, as it is only by training and increasing the knowledge and awareness of these platforms that their benefits can be capitalized on by all.

Unfortunately, the access to and use of ICTs is still unequal in the region and digital illiteracy or the lack of sufficient and adequate access or use may result in an added barrier for the exercise of environmental access rights. To prevent new technologies from generating inequality and hindrances, the paragraph strictly prohibits any constraint or discrimination resulting from the use of electronic media. Consequently, alternative formats and means shall be provided to overcome any particular difficulty that the public may encounter.

10. The Parties may promote knowledge of the provisions of the present Agreement in other international forums related to environmental matters, in accordance with the rules of each forum.

By means of this general provision, parties are encouraged to disseminate the contents of the treaty in other international forums related to the environment. Maintaining consistency between the application of environmental access rights at the national and international levels is what motivated the inclusion of this paragraph. In so doing, it was recognized that the content of the Agreement was of importance at various levels and that it could contribute to other intergovernmental and international forums on environmental matters.

Several aspects are worth noting. First, the provision uses the verb "may promote", indicating its recommendatory nature. Second, its scope of application is limited to international forums related to environmental matters, but it applies both to those of bilateral or multilateral nature. Third, any promotion of the knowledge of the provisions should be carried out in accordance with the rules of each forum. These characteristics recognize the sovereign powers of each State to determine its foreign policy and the autonomy and independence of each forum to establish its regulations.

This provision is complementary to the obligation to promote public participation in international forums and negotiations on environmental matters included in paragraph 12 of article 7.

III. Access to environmental information

The Escazú Agreement sets a regional standard for access to environmental information for Latin American and Caribbean countries with procedural measures for the implementation of this right. Access to environmental information, the first "pillar" of access rights, requires competent authorities to disclose information in their possession, control and custody on request and to proactively publish certain types of environmental information.

The substantive provisions related to access to information are found in articles 5 and 6. The terms "environmental information" and "competent authority" are defined in article 2, indicating the scope and types of information that may be requested in article 5, certain types of information that should be proactively disclosed in article 6 and the entities that have a duty to disclose information requested by the public.

Access to environmental information is interconnected with the other access rights as it enables public participation in environmental decision-making and access to justice. People who are well-informed are able to engage meaningfully in environmental processes and to become knowledgeable about their rights and how to claim them.

The disclosure of environmental information may also help people to enforce and protect other rights, including the right to a healthy environment, by creating a greater understanding of their rights and measures to obtain redress.

The right of access to information stems from the principle that the public has a right to know how the governments they elect exercise power and spend public funds. Through access to information, the public is able to scrutinize the actions of the State and challenge mismanagement and corruption by increasing transparency and holding public authorities to account.

As with all the provisions in the Escazú Agreement, the standard for access to information outlined in these provisions is a floor and not a ceiling and States may choose to include higher standards.

A. Article 5 – Access to environmental information

This section provides an explanation of article 5, which sets out the provisions concerning the aspect of access to information referred to as "passive transparency", whereby information is provided at the request of a member of the public. This obligation is explained and guidance is provided for how parties should implement this article.

Table III.1 provides an overview of the main obligations contained in article 5 and practical guidance for its implementation.

Table III.1
Main obligations contained in article 5 of the Escazú Agreement and implementation guidance

Provision	Obligation	Implementation guidance
Paragraph 1	Ensure the public's right of access to environmental information	- Applies to environmental information in the possession, control or custody of a party - Must comply with the principle of maximum disclosure
Paragraph 2	Uphold content of the right of access to environmental information	- Right to request and receive information from the competent authorities - No interest or reason for the request need be stated - Inform promptly whether the information is in possession of the competent authority - Inform of the right to appeal and the requirement for appeal if the information is not delivered
Paragraph 3	Facilitate access to environmental information for persons or groups in vulnerable situations	- States are required to establish procedures for assistance to persons and groups in vulnerable situations - Assistance must be based on the conditions and specificities of the vulnerable persons or groups - Assistance should range from the formulation of requests to the delivery of information
Paragraph 4	Guarantee that persons or groups in vulnerable situations receive assistance	- Assistance in preparing requests and obtaining a response
Paragraph 5	Communicate refusal in cases of non-delivery under the domestic legal regime of exceptions	- Written refusal to be given with reasons and the legal provisions on which the decision is based - Applicant to be informed of the right to appeal
Paragraph 6	May establish exceptions where information may be refused	- Exceptions may be set out in national legislation - Where there is no national law, four specific exceptions may be applied at the discretion of the authority
Paragraph 7	Take into account human rights obligations and encourage exception regimes that favour disclosure	- Limited exceptions - Exceptions limited by law - Exceptions must conform to tests of necessity and proportionality - Exceptions must apply for a reasonable period. New exceptions or amendments to exception regimes should conform to the principle of maximum disclosure
Paragraph 8	Legally establish in advance reasons for refusal and take into account the public interest	- Reasons for refusal must be in the legal framework - The public interest in disclosure versus non-disclosure should be taken into account, and reasons for refusal should be interpreted restrictively - The obligation to justify the refusal lies with the competent authority
Paragraph 9	Apply the public interest test	- Weigh the interest of withholding the information against the public benefit of disclosing it, based on suitability, need and proportionality

Provision	Obligation	Implementation guidance
Paragraph 10	Disclose non-exempt material that is part of the requested information	- Disclosure of requested information must not include exempt material (severability)
Paragraph 11	Provide information in requested format	- Applicant to decide preferred format of information - The format is subject to availability
Paragraph 12	Respond to requests in a limited period	- The response to the request must be provided as quickly as possible - The maximum period for response is 30 business days or less if stipulated by national law
Paragraph 13	May extend period for responding to requests in exceptional circumstances	- Reasons for extension must be "exceptional" and set out in national law - Extension of period for response must be no longer than 10 business days - Applicant must be given written notice of extension
Paragraph 14	Safeguard the applicant's right to challenge the failure of authority to respond	- The applicant may challenge and appeal the failure of the competent authority to respond to the request within the time frames specified in articles 5.12 and 5.13
Paragraph 15	Notify if the requested information is not in possession of the authority and transfer the request to the relevant authority	- Notification must occur as quickly as possible - Duty to identify the relevant authority in possession of the information and to transfer the request
Paragraph 16	Inform and explain why the information does not exist or has not been generated	- The notification and explanation must be provided within 30 business days or less if stipulated by national law - If the period for response has been extended, the period for notification and explanation must be within 10 business days
Paragraph 17	Ensure that the applicant is not required to pay for the cost of access, with the exception of reproduction and delivery costs	- The cost of reproduction and delivery, if charged, must be reasonable and the applicant should be aware of the costs in advance - Costs may be waived for persons and groups in vulnerable situations or in special circumstances
Paragraph 18	Establish or designate one or more independent oversight mechanisms	- Mechanisms must be impartial, with autonomy and independence - Roles include promoting transparency, overseeing compliance, monitoring, reporting and guaranteeing the right of access to information - Sanctioning powers may be included or strengthened

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of the Escazú Agreement.

1. Accessibility of environmental information

5.1. Each Party shall ensure the public's right of access to environmental information in its possession, control or custody, in accordance with the principle of maximum disclosure.

Article 5.1 recognizes that the public has the right of access to environmental information and that parties have an obligation to guarantee this right. As per article 4.3, States have the obligation to put in place a legal framework to give effect to the right as well as any necessary government structures, administrative procedures and practices to ensure the public is able to exercise this right.

This duty is to the "public" and extends only to information that falls within the definition of "environmental information". Both the definitions of the "public" and "environmental information" are set out in article 2 of the Agreement. The definition of environmental information may include a variety of information across a wide range of sectors. It is also sufficiently wide to cover the various formats of information including written, visual, audio and electronic.

Information in the possession, control or custody of a party refers not only to information that may be physically held by the Party but also to information that may be otherwise accessed through control or custody. This could include information a competent authority produces or is legally obligated to produce or information that it collects or is required to collect as part of its functions and mandate. For example, in practice, information such as the records generated by the competent authority could be physically stored in a facility belonging to a different entity but the competent authority nonetheless maintains an element of control over the information by having the right and power to manage it. Likewise, the information may have been generated and belong to another entity but may be in the custody of the competent authority. In addition to having some right to deal with the information, custody also implies having some responsibility for its care and protection.

While a competent authority is not required to generate information requested or provide information that is not in its possession, control or custody, there is a general obligation under provision 6.1 to generate environmental information relevant to its functions to the extent possible based on the availability of resources. Proactively generating and disclosing environmental information has the added benefit of reducing the number of requests for information made to public authorities.

The principle of maximum disclosure is one of the governing principles in article 3 intended to guide parties in their implementation of the Agreement. This principle, also expressly included in article 5.1, is a well-recognized foundational element of legal frameworks regarding access to information. Several national freedom of information laws in Latin America and the Caribbean either expressly or implicitly incorporate this principle as well as the Model Inter-American Law on Access to Public Information adopted by the General Assembly of the Organization of American States (OAS).[39] The principle calls for a legal framework in which transparency and the right of access to information are the general rule, subject only to strict and limited exceptions. One of its stipulations is that the competent authority denying access to information bears the burden of proving that it may be withheld duly and legitimately.

[39] See Organization of American States (OAS), *Inter-American Model Law 2.0 on Access to Public Information*, Washington, D.C., 2020 [online] http://www.oas.org/en/sla/dil/docs/publication_Inter-American_Model_Law_2_0_on_Access_to_Public_Information.pdf.

5.2. The exercise of the right of access to environmental information includes:
(a) requesting and receiving information from competent authorities without mentioning any special interest or explaining the reasons for the request;
(b) being informed promptly whether the requested information is in possession or not of the competent authority receiving the request; and
(c) being informed of the right to challenge and appeal when information is not delivered, and of the requirements for exercising this right.

Article 5.2(a) ensures that an applicant requesting information from a competent authority does not have to mention any special interest, or to explain the reasons for obtaining the requested information or how they intend to use it. A competent authority's consideration of whether information may be disclosed must not include whether the applicant has any direct interest or personal involvement in the information or what their purpose is for seeking the information, but rather should exclusively have regard to the nature of the information itself, whether it falls within the definition of environmental information and whether there is any legitimate cause of refusal. It follows that information disclosed to an individual may be considered disclosed to the public and the person is free to circulate the information to the wider society. This is a fundamental pillar of access to information and a key safeguard to ensure equality and non-discrimination, as the emphasis is not placed on the person requesting the information but on the information itself.

The Escazú Agreement does not require the applicant to make the request in a particular format. States must, however, provide assistance to the public to facilitate their access rights under the general provisions of the Agreement (article 4.5). This facilitation could include ensuring that applicants are able to request information in writing, by electronic means, orally in person, by telephone, or by any alternative means.

Competent authorities are only required to provide access to environmental information in their possession, custody or control. Article 5.2(b) requires the competent authority to inform the applicant promptly whether the requested information is in its possession or not. This provision should be read jointly with article 5.15, which indicates the procedure to follow when a competent authority does not possess the requested information. In that case, it shall notify the applicant "as quickly as possible", indicating —if it is able to determine it— which authority may be in possession of the information. It shall also forward the request to the relevant authority and inform the applicant of this fact.

Practical measures may be taken by competent authorities to ensure they are able to provide information "promptly". These include establishing electronic record-keeping systems to make it easy to monitor and track requests for environmental information and respond to requests within the periods prescribed in the Agreement.

Further, article 5.2(c) establishes that an applicant also has a right to be informed of the right to challenge and appeal when environmental information is not delivered. This right may relate to different circumstances, such as when the competent authority refuses to provide the requested information, either in whole or in part, when the competent authority fails to deliver the information in the required period or when the applicant is told by the competent authority that the information does not exist, and they have reason for believing otherwise.

The information provided to the applicant must include the requirements for appeal. This is an important element of the exercise of the right to information since it supports a requestor's right to access justice when information has been refused.

5.3. Each Party shall facilitate access to environmental information for persons or groups in vulnerable situations, establishing procedures for the provision of assistance, from the formulation of requests through to the delivery of the information, taking into account their conditions and specificities, for the purpose of promoting access and participation under equal conditions.

Article 5.3 requires parties to establish procedures for assisting persons and groups in vulnerable situations throughout the process of requesting environmental information, including from the formulation of requests for information to the delivery of the information. "Persons and groups in vulnerable situations" are defined in article 2 of the Agreement. A broad definition was provided acknowledging that those who can be considered vulnerable may differ from country to country and depending on the context.

This provision does not require the circumstances of all persons to be absolutely identical but rather that each party shall take into account their conditions and specificities in order to ensure their right of access to environmental information under equal conditions. Parties have flexibility in determining appropriate measures, but those measures should address the conditions and specificities of vulnerable persons and groups in the specific context so as to allow them to have access to environmental information on equal footing.

These measures to facilitate access should be established within the national frameworks for access to information. Measures may be specific to categories of vulnerable persons, such as allowing oral requests and not obligating requests to be in writing for persons who are illiterate, or providing information in accessible formats for persons with disabilities.

This obligation is supported by article 4.5 which requires parties to provide guidance and assistance to the public and to persons and groups in vulnerable situations to facilitate their exercise of access rights, and by article 4.4 which stipulates a general requirement for parties to provide the public with information to facilitate their acquisition of knowledge on access rights.

5.4. Each Party shall guarantee that the above-mentioned persons or groups in vulnerable situations, including indigenous peoples and ethnic groups, receive assistance in preparing their requests and obtain a response.

Article 5.4 should be read in conjunction with article 5.3. This provision places a strong obligation on parties specifically to ensure that persons and groups in vulnerable situations receive assistance in preparing their requests for information and obtaining a response.

This obligation requires the implementation of measures within the national legal or administrative frameworks that could include alternative formats and specific procedures. These measures should be generally applicable to all vulnerable persons and groups and may include designated responsible officers with a duty to assist applicants in clarifying and making their requests for information.

The provision highlights indigenous people and ethnic groups within the category of persons and groups in vulnerable situations, in this particular case recognizing that depending on the context, specificities concerning these groups may hinder access. For example, some indigenous and ethnic groups do not speak the official language(s) of their country, and this could prevent them from being able to make requests for information where the public authority requires requests to be made in the official language(s). In all cases, vulnerability is determined by a party's context.

2. Refusal of access to environmental information

Paragraphs 5 to 10 of article 5 refer to the refusal of access to environmental information.

The Agreement recognizes that the right to access information may be refused under certain circumstances but provides boundaries to ensure this happens in a limited, exceptional, lawful, and non-arbitrary manner.

Of particular relevance to these paragraphs are the treaty's principles. The principle of maximum disclosure found in article 3 and reiterated in the specific obligation to ensure the public's right of access to environmental information is worthy of mention. Other principles include equality and non-discrimination and non-regression, which should also guide the application of any refusal of information.

Additional conditions that limit the scope of exceptions include those established in articles 5.7, 5.8 and 5.9, among others.

> 5.5. If the requested information or part thereof is not delivered to the applicant because it falls under the domestic legal regime of exceptions, the competent authority shall communicate its refusal in writing, including the legal provisions and the reasons justifying the decision in each case, and inform the applicant of the right to challenge and appeal.

The right to obtain environmental information is not absolute. A competent authority may refuse to provide all or a part of requested environmental information based on the domestic legal regime of exceptions. If the information is refused, this should be done based on exceptions in the party's national legal framework in keeping with article 5.8 which requires reasons for refusal to be legally established in advance. Where a party does not have a domestic legal regime of exceptions, paragraph 6 of article 5 applies.

The competent authority must give the applicant reasons for its refusal and inform them of their right to challenge and appeal the refusal. The right to challenge and appeal the decision includes access to legal and administrative mechanisms and the scope of this procedural right is discussed under article 8 on access to justice in environmental matters.

Any refusal must be provided in writing. Even when a request for information is made orally, the competent authority is obliged to give the refusal and reasons in writing.

The reason and legal basis for the refusal should be sufficiently clear to assure the applicant that the decision was not arbitrary and to ensure that it can be determined whether the refusal legitimately meets the exceptions set out in the national legal framework of the party.

Although not stated expressly, the competent authority should inform the applicant immediately upon deciding on whether to provide the requested information. This is in keeping with the obligations under article 5.12, which require the competent authority to respond to requests "as quickly as possible" or within a maximum period of 30 business days. These actions will facilitate the applicant's exercise of their right to access to justice by ensuring that they are aware of the procedure to be followed and are not prejudiced by delay in receiving this information.

5.6. Access to information may be refused in accordance with domestic legislation. In cases where a Party does not have a domestic legal regime of exceptions, that Party may apply the following exceptions:
(a) when disclosure would put at risk the life, safety or health of individuals;
(b) when disclosure would adversely affect national security, public safety or national defence;
(c) when disclosure would adversely affect the protection of the environment, including any endangered or threatened species; or
(d) when disclosure would create a clear, probable and specific risk of substantial harm to law enforcement, prevention, investigation and prosecution of crime.

This article provides guidance to parties on possible exceptions that may be applied in granting access to environmental information. The use of the verb "may" is relevant given the different meaning intended in this provision as opposed to other parts of the Agreement. In this case, it means permission to apply an exception under extraordinary and limited circumstances. Hence, the refusal of access is a mere possibility and not an obligation or a recommendation. In other words, the refusal must be in keeping with domestic legislation and within the national legal framework of each party. Where it exists, the Agreement is clear in requiring this exception regime to be included in law.

Where a party does not have a domestic legal regime of exceptions, the Agreement provides the list of the possible exceptions under which access to environmental information may be refused. The list includes the main causes of refusal that are commonly accepted in the legal frameworks of countries in the region.

The first exception refers to the risk to life, safety or health of individuals. Competent authorities may refuse to provide information if its disclosure could endanger these fundamental rights of individuals, expressly protected in international law in human rights treaties and the constitutions of many countries.

The second exception to which competent authorities may recur to refuse information is if disclosure would adversely affect national security, public safety or national defence. "National security", "public safety" and "national defence" are not defined in the Escazú Agreement. The competent authorities should be able to determine whether the information would cause this specific harm if disclosed. In keeping with provision 5.8, the scope of these exceptions and how to apply them should be clearly defined in the national legal framework, which could include legislation as well as jurisprudence.

Third, competent authorities may refuse to provide information which, if disclosed, would adversely affect the environment, including endangered or threatened species. One example would be a case in which it would allow the relevant authority to protect the location of habitats, nesting sites or breeding sites of endangered or threatened species which, if disclosed, could result in illegal exploitation.

The fourth and final exception is when disclosure would create a clear, probable and specific risk of substantial harm to law enforcement, prevention, investigation and prosecution of crime. The harm test here requires that the harm should not only be related to this category of exception, but it should be likely to occur and must be substantial. This exception is to ensure that the State is able to safeguard criminal investigations, crime prevention strategies and legal proceedings related to criminal cases in which the release of information could negatively affect their outcome.

5.7. The exception regimes shall take into account each Party's human rights obligations. Each Party shall encourage the adoption of exception regimes that favour the disclosure of information.

Several human rights treaties include the obligation to provide access to information. This general right to information is enshrined in the American Convention on Human Rights (article 13), the Universal Declaration of Human Rights (article 19) and the International Covenant on Civil and Political Rights

(article 19). These instruments also regulate any possible limitations to access to information. In particular, article 19.3 of the International Covenant on Civil and Political Rights indicates that it may be subject to certain restrictions, but "these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals."

Furthermore, useful guidance has been provided by international and regional human rights bodies on the application of exception regimes in the context of human rights obligations.[40] This guidance may be summarized as follows:

(a) **Limited exceptions:** parties should only have limited exceptions to the right of information. In accordance with the principle of maximum disclosure, the law must guarantee the effective and broadest possible access to public information with limited exceptions.

(b) **Exceptions established by law:** exceptions to the right to information should be expressly established by law in advance. In accordance with human rights treaties such as the American Convention on Human Rights and the International Covenant on Civil and Political Rights, exceptions should be limited to the specific cases set out in the treaties, which include objectives that are necessary for the respect of the rights or reputations of others and for the protection of national security or of public order, or public health or morals. The essence of this requirement is to ensure that public authorities apply the exceptions reasonably and narrowly, and not arbitrarily.

(c) **Exceptions must be clear and precise and conform to tests of necessity and proportionality:** the restriction on freedom of information must: (i) be conducive to the attainment of the objective; (ii) be proportionate to the interest that justifies it and (iii) interfere to the least extent possible with the effective exercise of the right.

The criteria of suitability, necessity and proportionality have been incorporated into the public interest test of the Escazú Agreement under article 5.9, which is also considered in detail below.

(d) **The exceptions should involve a reasonable period of application:** any exception should operate for a limited and reasonable period when the risk of harm related to disclosure may occur. Once the period of risk of harm has ended, the information must be made available to the public.

Parties must "encourage" the adoption of exception regimes that favour the disclosure of information. This provision should be read collectively with the general obligation under article 5.1 to grant access to environmental information in accordance with the principle of maximum disclosure. Laws that do not grant effective and broad access with limited exceptions would be inconsistent with this principle. Any new regime of exceptions or amendments to an existing regime of exceptions, as provided for by the party in their national legal framework on access to environmental information, should be all-inclusive and parties should not permit other laws to extend the categories of exceptions outside the ambit of this framework.

5.8. The reasons for refusal shall be legally established in advance and be clearly defined and regulated, taking into account the public interest, and shall thus be interpreted restrictively. The burden of proof will lie with the competent authority.

[40] See United Nations, "General comment No. 34. Article 19: Freedoms of opinion and expression. General remarks" (CCPR/C/GC/34), New York, 2011; "Promotion and protection of the right to freedom of opinion and expression: note by the Secretary-General" (A/68/362), New York, 2013.

Although countries have flexibility in determining the reasons for refusal under national law, the Agreement requires that these reasons not be arbitrary but "legally established in advance" and "clearly defined and regulated", meaning they should be set out in the national legal framework on access to information.

In the absence of a national law on exceptions, the Escazú Agreement provides for a list of possible exceptions (article 5.6). The intent behind this provision was to guide those countries that have not yet enacted a freedom of information law or regulation applicable to environmental information.

The categories of exceptions should be sufficiently clear and specific so that public authorities can easily determine whether the requested information falls within any of these categories. This will ensure that the parties apply the exceptions in a consistent manner whenever information is requested and only to the extent that the interest of withholding the information surpasses the interest of making that information public.

The provision requires a restrictive interpretation of the exceptions. A refusal to provide information should be based, first, on whether it falls within a category of exceptions, that is, whether an interest favouring non-disclosure exists, and second, on whether the interest would be adversely affected. Third, competent authorities are also then required to take into account the public interest when deciding whether to refuse access to information. The reference to the public interest implies that the competent authority should apply a public interest test to weigh the benefit of withholding versus that of disclosing the information. Any doubt as to whether the information falls within an exception regime or where the public interest lies should be resolved in favour of granting access to the maximum amount of information in line with article 4.8.

Pursuant to article 5.8, the onus is on the competent authority to justify the refusal to provide the requested information by proving that the reasons for the refusal fall within the scope of the exception being relied on and that the harm caused by disclosure outweighs the public interest in disclosing the information. This justification should be clearly defined and based on the legal grounds established in the national legal framework.

5.9. When applying the public interest test, the competent authorities shall weigh the interest of withholding the information against the public benefit of disclosing it, based on suitability, need and proportionality.

This provision should be read in conjunction with article 5.8. The competent authorities applying the public interest test to their decision to grant access to environmental information should weigh the interest in withholding the information against the public benefit of disclosing it. This balancing test should be based on "suitability", "need" and "proportionality".

The principles of suitability, necessity and proportionality have been applied in the realm of international human rights law related to freedom of information. Under the principle of suitability, it must be established that the restriction on access is related to achieving the legitimate aim of the exception. The principle of necessity requires consideration of whether other less restrictive measures on access that are equally effective are available. The principle of proportionality requires that any action taken by an authority must not restrict access beyond what is necessary to achieve the legitimate aim.

The Inter-American Commission on Human Rights, in the context of the right to freedom of information recognized by the American Convention on Human Rights, has considered the proportionality test in three steps, which is a useful exercise for competent authorities in applying the Escazú Agreement:[41]

(a) It must be related to a legitimate aim that justifies it.
(b) It must be demonstrated that the disclosure of the information effectively threatens to cause substantial harm to this legitimate aim.
(c) It must be demonstrated that the harm to the objective is greater than the public's interest in having the information.

[41] See [online] https://www.oas.org/dil/access_to_information_iachr_guidelines.pdf.

5.10. Where not all the information contained in a document is exempt under paragraph 6 of the present article, the non-exempt information shall be provided to the applicant.

Article 5.10 incorporates the principle of severability. Competent authorities are required to grant access to environmental information requested where it does not fall within one of the categories of established exceptions. A competent authority should examine the information requested and if part of the information does not contain exempt material, the authority must disclose the information with the exempt material redacted.

For example, if there is a request for a large document, not all the pages of the document may fall within the categories of exceptions stipulated in national law. In that case, the competent authority may provide access to the document with the exempt sections or pages deleted or marked out.

3. Conditions applicable to the delivery of environmental information

5.11. The competent authorities shall guarantee that the environmental information is provided in the format requested by the applicant, if available. If such a format is not available, the environmental information shall be provided in the available format.

Environmental information may come in a variety of formats including electronic or paper documentation, maps, diagrams and recordings, among others. The Escazú Agreement recognizes this and broadly defines the scope of environmental information to include any written, visual, audio, electronic or other format of recorded information.

The competent authorities are obligated to ensure that the applicant receives the information in the format requested if that format is available. Where the information is not available in the format requested, the information should nonetheless be provided in whichever format is available.

The right to receive information in the format requested is an important element of the right of access to information and may be beneficial to both the competent authority and the applicant. Information that is provided in the format requested will satisfy the needs of applicants which could include persons with disabilities or limitations. For example, persons who are blind or illiterate would likely prefer to receive information as recordings while persons without access to computers may prefer paper copies of documents. Providing information electronically is also less costly and allows the competent authority to provide the information more quickly.

The competent authorities are not required to generate information under article 5 if they do not have the information available in the format requested. Notwithstanding, under article 6.1, parties are required to generate environmental information relevant to their functions based on their available resources. It may also be in the authority's best interest to have the most commonly requested formats available and proactively disclose that information, allowing it to reduce requests, increase efficiency and increase public satisfaction.

The right to information means receiving copies of the actual document requested and not summaries or extracts of the document.

5.12. The competent authorities shall respond to requests for environmental information as quickly as possible and within a period not longer than 30 business days from the date of receipt of the request, or less if so stipulated in domestic legislation.

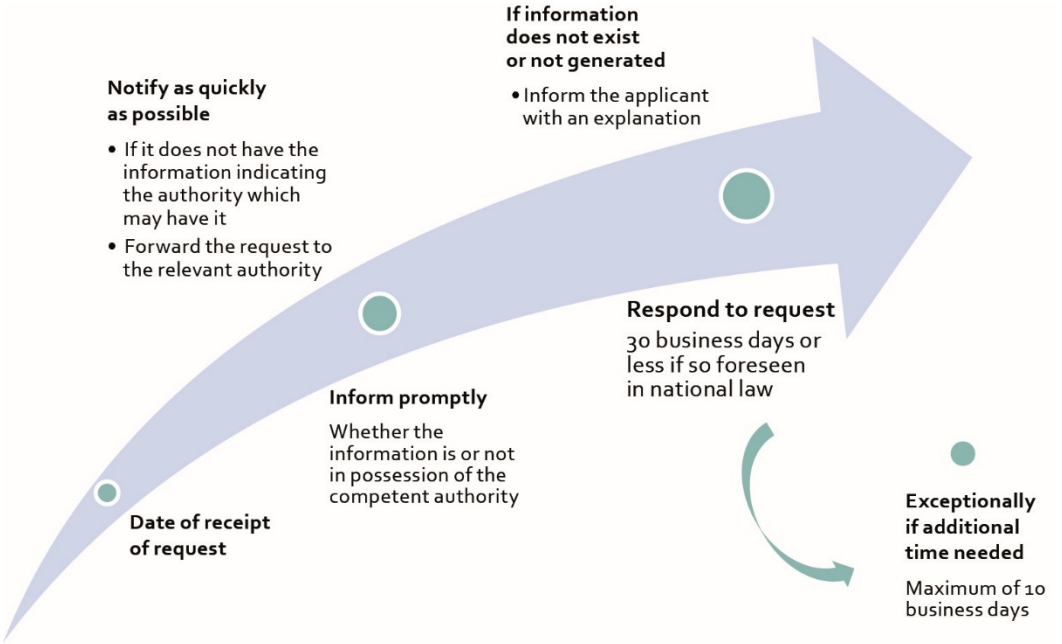
The competent authorities are required to respond to the requests for environmental information "as quickly as possible" and the maximum period for a response should be 30 business (or working) days. If authorities

are able to provide the information in less time they should do so. If a party's national legal framework on access to environmental information includes a period for providing access that is less than the period of 30 business days, that time frame shall be applied.

The period for providing a response begins on the date the competent authority has received the request for information.

The response referred to in this provision is the decision on the application and may include the decision to grant access to the information, to refuse to grant access or to inform the applicant that the information does not exist or has not been generated as yet (see diagram III.1). This obligation is separate from the requirement for the competent authority to respond promptly to an applicant to let them know whether the information is in their possession under articles 5.2(b) and 5.15.

Diagram III.1
Response to requests for environmental information under the Escazú Agreement



Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of the Escazú Agreement.

5.13. Where, in exceptional circumstances and in accordance with domestic legislation, the competent authority requires more time to respond to the request, it shall notify the applicant in writing of the justification for the extension prior to the expiration of the period established in paragraph 12 of the present article. Such an extension will not exceed 10 business days.

The competent authority may need more time than the 30 business days to respond to a request owing to several factors, such as the volume or nature of the information requested, or the difficulty in locating the information. Article 5.13 of the Escazú Agreement stipulates that the competent authority may extend the time period only in "exceptional circumstances" and "in accordance with domestic legislation". This means that the extensions should not be the norm but the exception. These conditions on allowable extension mean that there should be limited circumstances which must be set out in national legislation.

The competent authority must also give written notice to the applicant that it has extended the period of 30 business days for responding and provide reasons for the extension. This notice should be sent to the applicant before the period of 30 business days has expired.

The extension of time to respond shall not exceed 10 business days. The competent authority should provide the information in less time if it is able do so.

5.14. In the event that the competent authority does not respond within the periods established in paragraphs 12 and 13 of the present article, paragraph 2 of article 8 shall apply.

Article 5.14 of the Escazú Agreement stipulates that if a competent authority does not respond to the request within 30 business days or within the further 10 business days if the time frame for response has been extended, the applicant has the right to challenge and appeal the lack of response.

The right to challenge and appeal is set out in article 8.2 of the Agreement and is discussed in chapter V of the present guide. The scope of this right requires access to judicial and administrative mechanisms for the challenge and appeal, which must be provided for in national legislation.

It is implicit from this provision that the time frame for responding to a request for information may only be extended once, and any response outside the initial extension of 10 business days would be open to a legal challenge from the applicant.

5.15. When the competent authority receiving the request does not have the requested information, it shall notify the applicant as quickly as possible, indicating, if it can determine it, which authority may be in possession of the information. The request shall be forwarded to the relevant authority, and the applicant so informed.

If the competent authority does not have the requested information, it is obligated to inform the applicant which authority is in possession of the information if this can be determined. Article 5.15 of the Escazú Agreement should be read in conjunction with article 5.2(b), which also expressly stipulates that the applicant has the right to be notified if the information is not in the possession of the competent authority. Article 5.2(b) requires the notification to be made “promptly” while article 5.15 uses the language “as quickly as possible”. In both cases, this speaks to timely notification. As soon as the competent authority is aware that it is not in possession of the information and is able to notify the applicant, it should do so.

The competent authority is obligated to forward the request to the relevant authority and inform the applicant when this is done. Although article 5.15 does not specify the period to transfer the request for information, given that the competent authorities are required to notify the applicant that this information is not in their possession “as quickly as possible”, if they fail to forward the request in a timely manner this would go against the requirement of timely notification.

The competent authorities should be proactive in determining the kinds of information held by public authorities in keeping with article 6.1, which requires parties to strengthen coordination between the different authorities of the State.

5.16. When the requested information does not exist or has not yet been generated, the applicant shall be so informed, with explanation, within the periods established in paragraphs 12 and 13 of the present article.

The competent authority is required to inform the applicant if the information does not exist or has not been generated and provide an explanation. This response should be provided as quickly as possible and no more

than 30 business days or less if stipulated in the party's national law as required by article 5.12. If the period for response has been extended, the notification and explanation must be provided within the period of 10 additional business days stipulated in article 5.13.

5.17. Environmental information shall be disclosed at no cost, insofar as its reproduction or delivery is not required. Reproduction and delivery costs shall be applied in accordance with the procedures established by the competent authority. Such costs shall be reasonable and made known in advance, and payment can be waived in the event that the applicant is deemed to be in a vulnerable situation or to have special circumstances warranting such a waiver.

For information to be truly accessible, it must be affordable. Article 5.17 obligates parties to ensure that the applicant requesting information is entitled to access and view information free of costs. Only where the reproduction or delivery of information is required may there be applicable costs.

These costs should be reasonable based on an objective assessment of the actual market costs associated with reproducing and delivering information. This is to ensure that the costs are the same regardless of who requests the information and to avoid discriminatory treatment.

The competent authority is obligated to establish procedures for applying the costs for reproduction or delivery of different formats of information, e.g. a photocopy of a document may incur different costs than a recorded audio file and information provided electronically via email may incur no costs.

While this provision does not require the parties to set out the costs in law, they should be "made known in advance". This could entail including the costs in a policy or guideline document on access to information. This requirement is to ensure that the applicant seeking information is able to consider whether and how they wish to obtain the information.

Costs may be a barrier to access to information. If the applicant is in a vulnerable situation or in the event of certain circumstances, the party has the discretion to waive costs. For example, the competent authority may choose to waive reproduction and delivery costs for an applicant who is vulnerable owing to circumstances of poverty or in special circumstances such as the fact that the information is of great public interest that should be widely and publicly disclosed. The obligation of each party under article 5.3 to facilitate access to environmental information to persons or groups in vulnerable situations could be implemented in appropriate cases by waiving fees.

4. Independent oversight mechanisms

5.18. Each Party shall establish or designate one or more impartial entities or institutions with autonomy and independence to promote transparency in access to environmental information, to oversee compliance with rules, and monitor, report on and guarantee the right of access to information. Each Party may consider including or strengthening, as appropriate, sanctioning powers within the scope of the responsibilities of the aforementioned entities or institutions.

Article 5.18 requires each party to have an oversight mechanism that involves one or more bodies. These bodies may be newly established or be designated among existing institutions. Depending on a party's context and cultural reality, various models may be selected to oversee and enforce compliance with the rules of access to environmental information.

This provision allows for great flexibility in the model that a party is able to adopt in implementation:

(a) A party may either choose to establish an entity or institution or designate existing entities or institutions with this role.
(b) The relevant oversight body may be an entity such as an individual or an institution. Some countries have chosen to establish individual information commissioners while others have established multi-member tribunals to hear appeals.
(c) More than one entity or institution may be established or designated. There may be a body whose role is to promote public awareness and report on implementation, while another body may be responsible for hearing and resolving challenges and appeals related to access to environmental information. There could also be a two-tier appeal process with one body to hear the challenge in the first instance and another body to hear the matter on appeal.
(d) The entity does not have to be a specialized environmental body and may be one with more general functions such as an information commissioner, tribunal, public prosecutor or a court.

The requisite functions of the entities or institutions are set out in article 5.18 and can be grouped as follows:

(a) Promote transparency in access to environmental information: This could entail leading public awareness campaigns, training competent authorities and creating guidance and educational material.
(b) Oversee, monitor and report on the implementation of the right to access to environmental information. This role could entail requiring and receiving reports from competent authorities on the implementation of the requirements for access to environmental information; assessing record-keeping, publication of information and procedures for access of competent authorities; and the preparation of reports to the legislature on the status of implementation.
(c) Guarantee the right of access to environmental information. Each party is required to have at least one entity or institution to guarantee the right of access to environmental information. In keeping with article 8.2 of the Escazú Agreement, this requires an applicant to be able to access mechanisms for bringing a challenge or appeal where there has been a decision, action or omission that adversely affects their right to access environmental information, either procedurally or substantively. To guarantee this right, there should be an entity or institution that is able to issue decisions and provide adequate remedies. The party may choose whether the entities or institutions should have sanctioning powers. This refers to the authority to prescribe penalties such as fines or imprisonment for violation of the right of access to environmental information. Possible offences that could attract such penalties are deliberately falsifying, destroying or hiding information from an applicant.

Within this flexibility, the parties are required to ensure specific characteristics of the entities or institutions. They should be “impartial”, “independent” and “autonomous”. These characteristics are to ensure that the oversight and enforcement model adopted is able to ensure the effective application of the right to access environmental information, prevent arbitrariness and abuse, and hold the competent authorities accountable. Whereas “impartiality” may be defined as freedom from any bias, prejudice or self-interest, allowing the entity to arrive at decisions based solely on the law and facts, “independence” refers to the protection from influence at all levels of government. In turn, by means of “autonomy”, the entities or institutions should have control over their internal rules, procedures and budget, among others.

Some useful parameters for ensuring independence and impartiality in adjudicating bodies include protections against reductions in salary or dismissal from office on account of decisions made, selection and appointment processes that are transparent and objective and free from political interference, fixed budgets and the power to establish their own internal rules and procedures and security of tenure of the judicial or administrative authorities, and the provision of adequate budgets to conduct their business effectively.

B. Article 6 – Generation and dissemination of environmental information

This section provides an explanation of article 6 which sets out the provisions concerning the aspect of access to information referred to as "active transparency", where information is proactively published by the State. This obligation is explained, and guidance is provided for how parties should implement this article.

Table III.2 provides an overview of the main obligations contained in article 6 and practical guidance for its implementation.

Table III.2
Main obligations contained in article 6 and implementation guidance

Provision	Obligation	Implementation guidance
Paragraph 1	Guarantee that the competent authorities generate, collect, publicize and disseminate environmental information	- To the extent possible within available resources - Should be systematic, proactive, timely, regular, accessible and comprehensible - Information should be periodically updated - Information should be disaggregated and decentralized - Obligation to strengthen coordination between the different authorities of the State
Paragraph 2	Endeavour to ensure that environmental information is reusable, processable and available in accessible formats	- To the extent possible - No restrictions should be placed on reproduction or use, in accordance with domestic legislation
Paragraph 3	Have in place one or more environmental information systems	- Duty to establish at least one environmental information system - Systems shall be duly organized and publicly accessible - Systems shall be made progressively available through information technology and georeferenced media
Paragraph 4	Take steps to establish a pollutant release and transfer register	- Shall cover pollutants, materials and waste in each party's jurisdiction - Established progressively and updated periodically
Paragraph 5	Guarantee the immediate disclosure and dissemination of all pertinent information in case of imminent threat	- Disclosure and dissemination to be immediate - Required when there is an "imminent" threat to public health or the environment and before harm occurs - Use of the most effective means - Duty to develop and implement an early warning system
Paragraph 6	Endeavour to disseminate environmental information to persons or groups in vulnerable situations in their languages and comprehensible formats	- Dissemination in different languages used in the country - Use of alternative formats for information - Use of suitable channels of communication

Provision	Obligation	Implementation guidance
Paragraph 7	Use best endeavours to publish and disseminate a national report on the state of the environment	- Must be published at least every five years - Must be easily comprehensible - Must be publicly accessible in different formats - Disseminated through culturally appropriate means - Discretion to invite the public to contribute to the report
Paragraph 8	Encourage independent environmental performance reviews of national environmental policies in fulfilment of national and international commitments	- Efficacy and effectiveness of national policies are to be assessed - Nationally and internationally agreed criteria, guides and common indicators to be used - Stakeholders must have the opportunity to participate in reviews
Paragraph 9	Promote access to environmental information in arrangements for use of public goods, services or resources	- Environmental information in concessions, contracts, agreements or authorizations for the use of public goods, services or resources - In accordance with domestic legislation
Paragraph 10	Ensure consumers and users have information on environmental qualities of goods and services	- Information should be official, relevant and clear - The objective is to favour sustainable production and consumption patterns
Paragraph 11	Create and update archiving and document management systems	- In accordance with applicable rules - The aim is to facilitate access to information at all times
Paragraph 12	Take the necessary measures to promote access to information on the operations of the private sector in the possession of these private entities	- Must take necessary measures to promote access - Use of legal and administrative frameworks, among others
Paragraph 13	Encourage corporate sustainability reports	- Implementation shall be based on the party's capacity - Should include private and public sector company information on social and environmental performance

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of the Escazú Agreement.

6.1. Each Party shall guarantee, to the extent possible within available resources, that the competent authorities generate, collect, publicize and disseminate environmental information relevant to their functions in a systematic, proactive, timely, regular, accessible and comprehensible manner, and periodically update this information and encourage the disaggregation and decentralization of environmental information at the subnational and local levels. Each Party shall strengthen coordination between the different authorities of the State.

Parties have a mandatory obligation under article 6.1 of the Escazú Agreement to ensure that the competent authorities generate, collect, publicize and disseminate environmental information relevant to their functions. However, the fulfilment of this obligation is dependent on feasibility and the capacity and resources available to the party.

For the purposes of article 6, the competent authorities include public authorities as well as private authorities that perform public services or receive public benefits as defined in article 2 of the Agreement. The types of environmental information are broad as defined in article 2 of the Agreement but should be related to their functions. For example, this would include an authority responsible for managing a public resource such as a water utility company, whether public or private.

A significant duty under this provision is that the competent authorities must be proactive in generating this type of environmental information, which would apply even where it may not have previously existed.

Article 6.1 stipulates several conditions regarding the way information should be placed in the public domain. It requires this to be done in a "systematic, proactive, timely, regular, accessible and comprehensible manner". Information is the most useful and reliable when it is provided in a timely manner and periodically updated.

The use of publicly accessible registry systems ensures that information is collected and kept in a systematic manner which facilitates regular updating and timely disclosure. Systems may be put in place to ensure the collection of information from entities that are related to the functions of the competent authorities such as researchers or licence or permit holders.

The competent authorities may ensure that information is accessible by disseminating it using different formats such as online registries or websites or paper registries. Some environmental information tends to be technical. The competent authorities are also required to consider how to ensure that this information is "comprehensible", meaning clear and understandable for the public.

Parties should encourage the disaggregation and decentralization of environmental information at the subnational and local levels. Certain types of information are usually held in central offices or by central departments of government. Ensuring that environmental information is held at the subnational and local levels facilitates the availability of information to all levels of society.

State authorities are required to strengthen coordination. Since this obligation falls within article 6.1 on the dissemination of information, it is inferred that this coordination is related to the generation, collection, publication and dissemination of information. One way in which entities may do so is through the sharing of information related to their functions.

6.2. The competent authorities shall endeavour to ensure, to the extent possible, that environmental information is reusable, processable and available in formats that are accessible, and that no restrictions are placed on its reproduction or use, in accordance with domestic legislation.

Article 6.2 recognizes the importance of ensuring that information is available in a format that allows free reproduction, reuse and sharing as an element of access to information.

Under this provision, the competent authorities are required to "endeavour to ensure, to the extent possible" that environmental information is "reusable", "processable" and "available" in accessible formats with no restrictions on reproduction or use.

This obligation extends to a wide range of information that conforms with the definitions of "environmental information" under article 2 of the Escazú Agreement.

While there is no explicit mention of the term “open data” in this provision, the description of the format for environmental information is in keeping with this term. Open data, which are freely and openly accessible raw data (datasets) in a machine-readable and reusable format, are increasingly being used by governments as a means of proactively disseminating information related to the services and functions of authorities. Having information in open data formats may reduce the number of requests for information to public authorities. Another advantage is that it may facilitate research and analysis of public data to foster greater understanding, improve public service delivery and inspire innovation and growth to bring about social, economic and environmental benefits.

The reference to “endeavour to ensure, to the extent possible” implies that the competent authorities are obliged to meet this obligation to the extent that they are able, in view of their capacities or resources. This obligation to have information in a format that meets the criteria in article 6.2 is supported by article 4.9 of the general provisions of the Escazú Agreement, which specifically requires parties to encourage the use of new information and communications technologies, such as open data.

Parties should try to remove restrictions that prevent the user of environmental information from reproducing and using it. This means that the user should be able to modify, combine or share the information. Common limitations in reproduction and use include the costs of access and use, disclosure in formats that prevent reuse and the need to obtain copyright permissions for every use. This provision also implies that users of this information are also free to use the information for commercial purposes. An essential component of open data is that they must be licensed to authorize people to use or share them as they want.

6.3. Each Party shall have in place one or more up-to-date environmental information systems, which may include, inter alia:

(a) the texts of treaties and international agreements, as well as environmental laws, regulations and administrative acts;
(b) reports on the state of the environment;
(c) a list of public entities competent in environmental matters and, where possible, their respective areas of operation;
(d) a list of polluted areas, by type of pollutant and location;
(e) information on the use and conservation of natural resources and ecosystem services;
(f) scientific, technical or technological reports, studies and information on environmental matters produced by academic and research institutions, whether public or private, national or foreign;
(g) climate change sources aimed at building national capacities;
(h) information on environmental impact assessment processes and on other environmental management instruments, where applicable, and environmental licences or permits granted by the public authorities;
(i) an estimated list of waste by type and, when possible, by volume, location and year; and
(j) information on the imposition of administrative sanctions in environmental matters.

Each Party shall guarantee that environmental information systems are duly organized, accessible to all persons and made progressively available through information technology and georeferenced media, where appropriate.

Parties have an obligation to have at least one environmental information system (EIS) under article 6. 3. The provision acknowledges that parties may have more than one such system and indeed, countries may consider it desirable to have more than one EIS tailored to specific areas across wide-ranging environmental subject matters, e.g. climate change-related information, permitting or pollutant-related information.

Article 6.3 provides an indicative list of types of information that parties may, at their discretion, include in an EIS. These include:

(a) Treaties, international agreements, environmental laws, regulations, administrative acts
(b) Reports on the state of the environment
(c) A list of environmental public entities and their functions
(d) A list of polluted areas
(e) Information on the use and conservation of natural resources and ecosystem services
(f) Information on environmental matters produced by academic and research institutions
(g) Climate change-related information
(h) Environmental impact assessment processes, environmental management instruments and licences and permits
(i) Types of waste
(j) Administrative sanctions in environmental matters

This is not an exhaustive list, and parties may choose to include information that is not listed in this provision.

While the types of environmental information included in the EIS are discretionary, the parties must meet specific criteria for these systems. First, parties are required to ensure that the EIS is duly organized. This requirement will facilitate access by enabling the users to easily locate and obtain the information and can be accomplished in a number of ways, including through the use of registries. This will also help parties understand where there are information gaps and encourage greater efficiency in public administration.

Second, the EIS must be "accessible to all persons". This is significant since it indicates that the systems and their content must be easy to access, understand and use by everyone, without discrimination of any kind. One way to ensure accessibility is through web-based systems, although physical accessibility standards would also apply.

While article 6.3 does not specifically require an EIS to be electronic, parties are required to ensure that they are publicly accessible and made progressively available through information technology and georeferenced media, where appropriate. Several countries are using information technology to create EIS as online platforms.

Parties are obliged to ensure the EIS is "up-to-date". States may establish systems of information flow between public authorities and other entities that generate or collect environmental information to ensure that public authorities can easily update information. This may easily be done where, for example, licences are issued for pollutant discharges into the environment that are required to be monitored.

6.4. Each Party shall take steps to establish a pollutant release and transfer register covering air, water, soil and subsoil pollutants, as well as materials and waste in its jurisdiction. This register will be established progressively and updated periodically.

Parties are required to "take steps" to establish a pollutant release and transfer register (PRTR) on air, water, soil, subsoil, material and waste pollutants in their jurisdiction under article 6.4.

A PRTR is a database that tracks the release of potentially harmful releases of pollutants into the environment, for instance through air emissions, discharges in water and soil or the transfer, management and disposal of waste or hazardous materials.

PRTRs may provide substantial environmental benefits, as they are one of the most important tools for the dissemination of environmental information. When the public and government are aware of sources of pollution, this may help them to make better-informed decisions that affect health and the environment. PRTRs also create an incentive for reporting facilities to reduce or prevent pollution by employing better environmental management methods.

Since the 1992 Rio Declaration on Environment and Development, which recognizes the importance of public access to environmental information, there has been considerable attention to PRTRs in international instruments and several countries. Article 5.9 of the Aarhus Convention includes a similar obligation to progressively establish a PRTR and in May 2003, the Protocol on PRTRs, the first legally binding instrument on PRTRs, was adopted in Kyiv at an extraordinary meeting of the parties to the Aarhus Convention.

Although article 6.4 phrases this as an obligation to "take steps", these registers should be "established progressively" and "updated periodically". Parties meet this obligation by showing that they are taking active steps with clear advancements in having a PRTR which is regularly updated. Regular updating can be facilitated through the flow of information from facilities that are obliged to monitor and report on their emissions and discharges of pollutants as a condition in their licensing requirements for their operations.

Several steps may be followed to set up pollutant release and transfer registers (see box III.1).

Box III.1
Six-stage framework to address the design of pollutant release and transfer registers (PRTRs)

The United Nations Institute for Training and Research (UNITAR) has developed a six-stage framework to address the key steps of the design of PRTRs to be taken into account by the national body in charge of developing the system:

(i) Identify the goals and objectives of the PRTR system by undertaking consultations with all affected and interested stakeholders.
(ii) Conduct an assessment of the existing legal, regulatory, institutional, administrative and technical infrastructure relevant to a national PRTR.
(iii) Assess the PRTR system's key features that may differ from country to country according to resources, types and sizes of industrial sectors, national policy priorities, geographical or political circumstances and environmental needs.
(iv) Test the PRTR system on a limited scale by conducting a pilot.
(v) Finalize the national PRTR proposal to be approved by national authorities.
(vi) Organize a national PRTR implementation workshop to secure policy commitment and sustainability of the PRTR system in the future.

Source: United Nations Institute for Training and Research (UNITAR), *Collection of International Guidance Materials on Pollutant Release and Transfer Registers*, Geneva, 2017.

6.5. Each Party shall guarantee that in the case of an imminent threat to public health or the environment, the relevant competent authority shall immediately disclose and disseminate through the most effective means all pertinent information in its possession that could help the public take measures to prevent or limit potential damage. Each Party shall develop and implement an early warning system using available mechanisms.

Parties have a strong obligation under article 6.5 to guarantee that in the case of an imminent threat to public health or the environment, the relevant competent authority immediately discloses and disseminates through

the most effective means all pertinent information in its possession that could help the public take measures to prevent or limit potential damage. Parties are also required to develop and implement an early warning system using available mechanisms.

Disaster risk reduction has been incorporated into the 2030 Sustainable Development Goals (SDGs). Under Goal 3, to ensure healthy lives and promote well-being for all at all ages, countries have been set target 3.d to strengthen the capacity for early warning, risk reduction and management of national and global health risks. Goal 13, which requires countries to take urgent action to combat climate change and its impacts, includes target 13.3 to improve education, awareness-raising and human and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning.

The Sendai Framework for Disaster Risk Reduction 2015–2030 is likewise relevant.[42] One of its seven global targets is to substantially increase the availability of and access to multi-hazard early warning systems and disaster risk information and assessments to people by 2030. Moreover, emphasis is placed on investing in, developing, maintaining and strengthening people-centred multi-hazard, multisectoral forecasting and early warning systems, disaster risk and emergency communications mechanisms, social technologies and hazard-monitoring telecommunications systems; developing such systems through a participatory process; tailoring them to the needs of users, including social and cultural requirements, in particular gender; promoting the application of simple and low-cost early warning equipment and facilities; and broadening release channels for natural disaster early warning information.

At the regional level, the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena Convention) includes obligations to notify in the event of threats to public health and the environment.[43]

The obligation in article 6.5 is particularly relevant to Latin America and the Caribbean, which as a region is highly vulnerable to earthquakes, hurricanes and storms. It is considered the second most disaster-prone region in the world, with approximately 152 million people estimated to have been affected by 1,205 disasters during the period 2000–2019.[44]

The reference to a "threat to public health or the environment" includes man-made or natural disasters, while the reference to the "relevant competent authority" acknowledges that useful information on mitigating harm from hazards may lie with one or multiple authorities depending on the type of hazard.

This obligation to proactively disclose information is triggered by an "imminent" threat to public health or the environment. In the face of such a risk of harm, parties should take action to disclose information and there is no need for harm to occur.

Parties should use "the most effective means" for disclosing and disseminating information, so using different methods of communication and various forms of media and public announcement systems (e.g. television, radio, the Internet and newspapers) may be needed simultaneously and collectively to ensure that information reaches all levels of society including the local level and the most vulnerable.

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[42] See United Nations, *Sendai Framework for Disaster Risk Reduction 2015–2030*, Geneva, 2015 [online] https://www.preventionweb.net/files/43291_sendaiframeworkfordrren.pdf.

[43] "When a Contracting Party becomes aware of cases in which the Convention area is in imminent danger of being polluted or has been polluted, it shall immediately notify other States likely to be affected by such pollution, as well as the competent international organizations. Furthermore, it shall inform, as soon as feasible, such other States and competent international organizations of measures it has taken to minimize or reduce pollution or the threat thereof."

[44] See United Nations Office for the Coordination of Humanitarian Affairs (OCHA), United Nations Office for the Coordination of Humanitarian Affairs. "Latin America and the Caribbean: Natural Disasters in Latin America and the Caribbean 2000-2019", New York, 2020.

The type of information that should be disclosed is "all pertinent information" in possession of the relevant competent authority, which is information that can assist the public to prevent or limit potential damage. Pertinent information may include the nature of the threat, for example physical, chemical and biological characteristics, safety recommendations, predictions about how the threat could develop, results of investigations, and reporting on remedial and preventive actions taken.

The requirement for immediate disclosure signifies that there should be no delay in providing information. Providing timely information about anticipated hazards may help the public make adequate preparations to reduce or prevent harm and loss.

Parties are required to develop and implement an early warning system using available mechanisms. An early warning system is defined by the Global Disaster Preparedness Center as "the set of capacities needed to generate and disseminate timely and meaningful warning information to enable individuals, communities and organizations threatened by a hazard to prepare and to act appropriately and in sufficient time to reduce the possibility of harm or loss".[45] Establishing a system to meet this obligation may include training and designating responsible authorities for disseminating information based on the type of hazard and establishing notification systems between local government and emergency response services such as hospitals and fire services.

6.6. In order to facilitate access by persons or groups in vulnerable situations to information that particularly affects them, each Party shall endeavour, where applicable, to ensure that the competent authorities disseminate environmental information in the various languages used in the country, and prepare alternative formats that are comprehensible to those groups, using suitable channels of communication.

Article 6.6 places a general obligation on parties to try to ensure that the competent authorities disseminate environmental information in the various languages used in the country, and prepare alternative formats comprehensible to those groups, using suitable channels of communication.

This provision aims to facilitate access to environmental information for persons or groups in vulnerable situations. "Persons or groups in vulnerable situations" is defined in article 2 of the Escazú Agreement and is dependent on the context of each country. Parties should consider who these persons and groups may be and the types of environmental information that specifically affects them. To ensure that they are able to benefit from this information, parties should proactively disseminate information in the different languages used in the country where this is applicable, in formats that can be easily understood and using methods of communication that are suitable for those persons and groups in vulnerable situations.

6.7. Each Party shall use its best endeavours to publish and disseminate at regular intervals, not exceeding five years, a national report on the state of the environment, which may contain:
(a) information on the state of the environment and natural resources, including quantitative data, where possible;
(b) national actions to fulfil environmental legal obligations;
(c) advances in the implementation of the access rights; and
(d) collaboration agreements among public, social and private sectors.

Such reports shall be drafted in an easily comprehensible manner and accessible to the public in different formats and disseminated through appropriate means, taking into account cultural realities. Each Party may invite the public to make contributions to these reports.

[45] See Global Disaster Preparedness Center, "Early Warning Systems" [online] https://preparecenter.org/topic/early-warning-systems/.

Article 6.7 concerns reports on the state of the environment. Parties are required to use their "best endeavours" to publish and disseminate a national report on the state of the environment "at regular intervals", at least every five years.

The reference to best endeavours acknowledges that while the ability of parties to meet this obligation is dependent on their capacity, they should be able to show that they have taken all possible steps within their capacity to meet this obligation. In any event, parties should provide these reports at least every five years. The "best endeavours" requirement suggests that they should prepare these reports in shorter intervals where they have the capacity to do so.

The provision requires that reports should be provided at "regular" intervals, meaning a predictable schedule (e.g. annually and biannually), which will help promote foreseeability and comparability of reports. Providing reports on the state of the environment at regular intervals allows the public and government to better monitor environmental trends, impacts and threats and take necessary action to address them.

Parties have the discretion to determine the content of these reports, but article 6.7 provides an indicative list of the types of information that may be included in subparagraphs (a) to (d). These are:

(a) Information on the state of the environment and natural resources.
(b) National actions to fulfil environmental legal obligations.
(c) Advances in the implementation of the access rights.
(d) Collaboration agreements among public, social and private sectors.

The reports shall maintain certain characteristics specified in article 6.7. They should be "easily comprehensible" and therefore parties should avoid writing these reports using overly technical language. Reports should also be accessible to the public in different formats and disseminated using means that take into account the "cultural realities" in the country. Providing reports on the state of the environment in paper and electronic format and online, as well as in local community spaces such as libraries, is one way of ensuring that they are widely accessible.

The generation, publication and dissemination of reports on the state of the environment should be systematic, proactive, timely, regular, periodically updated and done in an accessible and comprehensible manner which are the requirements in article 6.1 that are generally applicable to all environmental information.

The requirements under article 6.3 for environmental information systems also apply, requiring reports on the state of the environment to be made progressively available through information technology and georeferenced media when included in such systems.

The article also stipulates that parties may invite the public to make contributions to the report.

6.8. Each Party shall encourage independent environmental performance reviews that take into account nationally or internationally agreed criteria and guides and common indicators, with a view to evaluating the efficacy, effectiveness and progress of its national environmental policies in fulfilment of their national and international commitments. The reviews shall include participation by the various stakeholders.

Parties are required under article 6.8 to encourage independent environmental performance reviews to evaluate the efficacy, effectiveness and progress of national environmental policies in meeting national and international commitments.

This obligation refers to the use of mechanisms for evaluating the State's environmental performance, e.g. audits. These evaluations should be done by entities that are independent of the government to ensure transparency and accountability in the findings of the reviews.

Environmental performance reviews may identify gaps and challenges in performance, improve environmental management and performance, promote greater accountability to the public in the use of public resources and contribute to the achievement and monitoring of SDG targets.

In undertaking these reviews, parties must take into account "nationally or internationally agreed criteria and guides" and "common indicators".

An example of these reviews may be found in the framework of the Organisation for Economic Co-operation and Development (OECD) (see box III.2).

Box III.2
The contribution of peer reviews to environmental democracy: environmental performance reviews

Since 1992, the Organisation for Economic Co-operation and Development (OECD) has been conducting environmental performance reviews of its member and partner countries. These are peer reviews that assess a country's overall performance over a given period and make policy recommendations to improve it. The reviews identify key environmental trends, environmental governance and management systems, and efforts towards mainstreaming the environment into economic policy. Each country also chooses specific topics for in-depth analysis, such as climate change, waste management and biodiversity. In addition to presenting trends, problems, solutions and opportunities, environmental performance reviews involve different stakeholders.

In Latin America and the Caribbean, OECD has partnered with ECLAC to conduct such reviews. To date, reviews have been undertaken in Brazil (2015), Chile (2005 and 2016), Colombia (2014), Mexico (1998, 2003 and 2013) and Peru (2016 and 2017).

Source: Economic Commission for Latin America and the Caribbean (ECLAC).

Parties must ensure participation by various stakeholders and this implies that these stakeholders should be given adequate opportunities to participate in the review process. This may include early consultation on the proposed methodology to conduct the reviews and to obtain qualitative and quantitative data to assess performance, and the review of the draft reports on the findings of reviews.

6.9. Each Party shall promote access to environmental information contained in concessions, contracts, agreements or authorizations granted, which involve the use of public goods, services or resources, in accordance with domestic legislation.

Parties shall promote access to environmental information in concessions, contracts, agreements, or authorizations granted, which involve the use of public goods, services or resources, by actively encouraging and furthering progress.

Governments play an important role in managing public goods, services and resources for the benefit of their people. These may cover a wide range of subject areas and are often critical for sustaining the environment and economy, e.g. the provision and delivery of potable drinking water to communities. There is great public interest in how public goods, services and resources are managed and used, and disclosure of related environmental information may assist in holding governments accountable in ensuring sustainable use.

Several countries already provide access to authorizations and concessions which is facilitated through the creation and use of permit and licence registers that are publicly accessible during office hours where copies can be obtained. The disclosure of contracts and agreements is sometimes facilitated through disclosure regimes in public procurement procedures.

Contracts and agreements may sometimes contain commercially sensitive information or personal information on third parties which is usually exempted from disclosure in national legislation. This provision does not require the disclosure of the entirety of these documents and limits access to the environmental information contained therein. It may be possible for parties to easily identify environmental information which may then be readily disclosed.

Article 6.9 should be read in conjunction with article 6.2 which requires States to strive to ensure that there are no restrictions on the reproduction or use of environmental information. Both articles, however, make clear that access to this type of information should be "in accordance with domestic legislation", that is, in conformity with national law.

6.10. Each Party shall ensure that consumers and users have official, relevant and clear information on the environmental qualities of goods and services and their effects on health, favouring sustainable production and consumption patterns.

Article 6.10 requires parties to ensure that consumers and users have information on the environmental qualities of goods and services and their effects on health.

The overall aim of this provision is to encourage the adoption of sustainable production and consumption patterns. Access to information on the environmental quality and health effects of goods and services is important to ensure that consumers are able to make informed choices. Examples of consumer information on environmental qualities and effects on health are eco-labelling, International Organization for Standardization (ISO) standards and categorization of products as organic or recyclable, for example.

The reference to "official" information implies that the information should be validated. This validation is sometimes carried out by government certification bodies. Information should be "clear" so that it is easily understandable for consumers and users.

6.11. Each Party shall create and keep regularly updated its archiving and document management systems in environmental matters in accordance with its applicable rules with the aim of facilitating access to information at all times.

Parties are required to create and update archiving and document management systems in environmental matters under article 6.11 of the Escazú Agreement. These systems may cover a range of areas including registers for permits and licences for projects or activities that may affect the environment. Furthermore, these systems should be regularly updated given that having current information ensures that those accessing and using it are able to make decisions based on reliable information.

Parties have flexibility in establishing their own rules for how these systems should be created and updated. The aim of this provision is to facilitate access to information "at all times" and implies that these systems should be easily and widely accessible. Access to information kept in physical locations may be restricted by office working hours, and parties may, therefore, consider meeting this obligation through the use of information technology to create online databases that are publicly accessible. The use of information technology in the proactive disclosure of environmental information is also encouraged in articles 6.3 and 4.9.

6.12. Each Party shall take the necessary measures, through legal or administrative frameworks, among others, to promote access to environmental information in the possession of private entities, in particular information on their operations and the possible risks and effects on human health and the environment.

Article 6.12 requires parties to take the necessary measures to promote access to environmental information held by private entities.

It is commonly recognized that private entities hold environmental information of importance to the public owing to the nature of their operations or where they perform public functions. In its report on SDG indicator 16.10.2 on access to information, the United Nations Educational, Scientific and Cultural Organization (UNESCO) notes the increasing trend of the release of privately-held information such as greenhouse gas emissions, use of post-consumer and industrial recycled material, water consumption and the amount of waste to landfill, and reaffirms the Finlandia Declaration which underscores that "the right to information encompasses access to information held by or on behalf of public authorities, or which public authorities are entitled to access by law, as well as access to information that is held by private bodies in respect of the exercise of public functions".[46]

The provision indicates that relevant information must include information on operations and possible risks and effects on human health and the environment, but this is not exhaustive and other types of environmental information should be included. The reference to this particular type of information indicates the recognition that the operations of private entities may have harmful effects and it is in the interest of the public to be able to access this information.

The obligation to promote access may involve various methods. Regardless of the method of access, parties are required to "take the necessary measures, through legal or administrative frameworks" to meet this commitment. This is an obligation for each party to ensure that it takes concrete steps to promote access and implies that parties should ensure an established procedure for access to this type of information, although there is flexibility as to the nature of the measure taken.

Significantly, the provision does not restrict access to private entities that use or provide public goods or services and recognizes that the focus is on the operations and possible risks and effects on human health and the environment.

This provision should also be applied in line with the domestic legal regime of exceptions regarding access to information.

6.13. In accordance with its capacities, each Party shall encourage public and private companies, particularly large companies, to prepare sustainability reports that reflect their social and environmental performance.

Each party shall encourage public and private companies to prepare sustainability reports that reflect their social and environmental performance "in accordance with its capacities".

Although this provision does not mention any obligation for parties to promote the disclosure of these reports or access to them, this obligation is implicit when read in conjunction with article 6.12 on the promotion of access to environmental information held by private entities and article 6.1 on the dissemination of environmental information related to the functions of the competent authorities.

[46] See United Nations Educational, Scientific and Cultural Organization (UNESCO), "Unpacking indicator 16.10.2: enhancing public access to information through Agenda 2030 for Sustainable Development", *Briefing Note*, 2016 [online] https://en.unesco.org/sites/default/files/unpacking_indicator16102.pdf.

IV. Public participation in the environmental decision-making process

Public participation in environmental decision-making is the second pillar of the Escazú Agreement. As with other access rights, its effectiveness depends on access to information and justice which, together with the capacity-building and cooperation provisions, sets the stage for the Agreement's full implementation.

Two different types of environmental decision-making process are distinguished in the Agreement for the purposes of public participation. On the one hand, there are projects, activities and other processes for granting environmental permits that have or may have a significant impact on the environment. These are generally subject to environmental impact assessments at the national level. On the other hand, there are other decision-making processes relating to matters of public interest, which include strategies, policies, programmes, rules and regulations on environmental issues, among others.

While there is no one-size-fits-all formula for public participation, the Escazú Agreement establishes certain general standards and core elements that must be met in all environmental decision-making processes. These include the open and inclusive nature of processes, participation in early stages, reasonable time frames, the provision of adequate information to participate, the opportunity to present observations and their due consideration by public authorities and specific attention to persons and groups in vulnerable situations. Additionally, certain provisions apply to activities and projects, with a view to safeguarding the rights of the directly affected public.

The Agreement also promotes public participation in international forums and negotiations, where appropriate and in accordance with domestic legislation, and adequate spaces for consultation on environmental matters.

The provisions on public participation in environmental matters may be grouped under three main categories: (i) provisions applicable to every environmental decision-making process (articles 7.1, 7.4–7.11, 7.14 and 7.15); (ii) provisions applicable exclusively to projects and activities that have or may have a significant impact on the environment (articles 7.2, 7.16 and 7.17); and (iii) provisions applicable exclusively to other decision-making processes of public interest (article 7.3). Moreover, there are provisions on public participation in international forums (article 7.12) and spaces for consultation on environmental matters at the national level (article 7.13).

Guided by the Escazú Agreement standard, public participation in environmental decision-making follows a three-stage process, summarized in diagram IV.1.

Table IV.1 provides an overview of the main obligations contained in article 7 and practical guidance for its implementation.

Diagram IV.1
Three-stage process of public participation in environmental decision-making

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of the Escazú Agreement.

Table IV.1
Main obligations contained in article 7 of the Escazú Agreement and implementation guidance

Provision	Obligation	Implementation guidance
Paragraph 1	Ensure the public's right to participation	- Commit to implement open and inclusive participation - Based on domestic and international normative frameworks
Paragraph 2	Guarantee mechanisms for public participation in projects and activities	- When there is or there may be a significant impact on the environment - Also applies to revisions, re-examinations and updates when these processes take place
Paragraph 3	Promote public participation in processes other than those referred to in paragraph 2	- With respect to environmental matters of public interest - When there is or there may be a significant impact on the environment - Also applies to revisions, re-examinations and updates when these processes take place
Paragraph 4	Adopt measures to ensure that participation takes place in the early stages	- Aims to ensure that due consideration can be given to the observations of the public - Public must be provided with the necessary information
Paragraph 5	Provide reasonable time frames	- Allow sufficient time to inform the public and for its effective participation
Paragraph 6	Provide a minimum of information to the public	- Through appropriate means - In an effective, comprehensible, and timely manner - Parties may provide additional information
Paragraph 7	Ensure the opportunity for the public to present observations	- Through appropriate means available according to the circumstances of the process - Due consideration to the outcome of the participation must be given before a decision is adopted
Paragraph 8	Ensure the public is informed of decisions made and their underlying grounds and reasons	- In a timely manner - Includes information on how the observations of the public have been taken into consideration - Decisions and their basis shall be made public and accessible

Provision	Obligation	Implementation guidance
Paragraph 9	Disseminate decisions in which the public has participated through appropriate means	- In an effective and prompt manner - Shall include the established procedure to allow the public to take relevant administrative and judicial actions
Paragraph 10	Establish conditions that are favourable to public participation and that are adapted to the characteristics of the public	- Include social, economic, cultural, geographical and gender characteristics of the public
Paragraph 11	When the primary language is different to the official languages, provide means to facilitate understanding and participation	- Obligation of the public authority - Applies only to the directly affected public
Paragraph 12	Promote public participation in international forums and negotiations and at the national level on matters of international environmental forums	- Where appropriate and in accordance with domestic legislation - In accordance with the procedural rules on participation of each forum
Paragraph 13	Encourage the establishment of appropriate spaces for consultation on environmental matters or the use of those in existence	- Promote regard for local knowledge, dialogue and interaction of different views and knowledge
Paragraph 14	Make efforts to identify and support persons and groups in vulnerable situations	- Aims to engage them in active, timely and effective manner - Appropriate means and formats to be considered
Paragraph 15	Guarantee each party's obligations in relation to the rights of indigenous peoples and local communities	- Obligations set out in domestic legislation or internationally assumed - Link to article 4.7
Paragraph 16	Make efforts to identify the public directly affected by projects and activities	- Identify projects and activities that have or may have a significant impact on the environment - Promote specific actions to facilitate the participation of the public directly affected
Paragraph 17	As a minimum, make public information on processes included in paragraph 2	- Additional information may be provided - Information to be made available free of charge in accordance with article 5.17

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of the Escazú Agreement.

A. Article 7 – Public participation in the environmental decision-making process

7.1. Each 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 based on domestic and international normative frameworks.

Paragraph 1 of article 7 refers to the public's right to participation in the environmental decision-making process. As an overarching provision that introduces the article, it sets out the categorical obligation to ensure this right, the content of which is specified in the subsequent paragraphs.

The public, as defined under article 2, holds the right to participation. Members of the public are able to take part in the environmental decision-making process either individually or in conjunction with others. However, two paragraphs of article 7 (7.16 and 7.17) specifically target the public that is "directly affected" with regard to activities and projects. The directly affected public enjoys the same rights as the other members of the public but requires that specific attention be given by parties considering their proximity to the decision or activity and the likely or foreseen impacts.

Participation shall be "open" and "inclusive". These two characteristics are mutually reinforcing. Participation processes shall be open to interested members of the public, on the basis of equality and non-discrimination, and actively seek the involvement of all sectors of society. Furthermore, they should be transparent and of a public nature.

The implementation of participatory processes is to be based on domestic and international normative frameworks. A growing number of instruments at the national and international level refer to and develop different aspects of public participation. By using the term "based on", parties recognize the need to consider and build on these instruments to implement the public participation provisions of the Escazú Agreement.

An international framework of particular importance is the 2030 Agenda, which expressly recognizes in target 16.7 the obligation to ensure responsive, inclusive, participatory and representative decision-making at all levels.

Multilateral environmental agreements also contain significant obligations in terms of public participation that complement those of the Escazú Agreement, such as those contained in the Framework Convention on Climate Change (UNFCCC),[47] the Paris Agreement,[48] the Convention on Biological Diversity (CBD)[49] and the Convention to Combat Desertification (UNCCD).[50]

In the human rights arena, international human rights instruments and mechanisms recognize the right to take part in the conduct of public affairs.[51] In interpreting the obligations of States under the International Covenant on Civil and Political Rights, the Human Rights Committee requires positive measures to be

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[47] See article 6 of UNFCCC: "In carrying out their commitments under Article 4, paragraph 1 (i), the Parties shall: (a) Promote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities: […] (iii) Public participation in addressing climate change and its effects and developing adequate responses; […]".

[48] See article 12 of the Paris Agreement: "Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement."

[49] See article 14 of CBD: "1. Each Contracting Party, as far as possible and as appropriate, shall: (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate. allow for public participation in such procedures; […]".

[50] See article 3 of UNCCD: "In order to achieve the objective of this Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following: (a) the Parties should ensure that decisions on the design and implementation of programmes to combat desertification and/or mitigate the effects of drought are taken with the participation of populations and local communities and that an enabling environment is created at higher levels to facilitate action at national and local levels; […]."

[51] See, among others, article 25 of the International Covenant on Civil and Political Rights. Human Rights Council resolution 33/22 has recognized that the rights of everyone to freedom of expression, to peaceful assembly, to freedom of association, to education, and access to information, and inclusive economic empowerment, are among the essential conditions for equal participation in political and public affairs and must be promoted and protected.

adopted to ensure the full, effective and equal enjoyment of participatory rights, including through inclusive, meaningful and non-discriminatory processes and mechanisms.[52] In October 2018, the United Nations Human Rights Council adopted the "Guidelines for States on the effective implementation of the right to participate in public affairs",[53] intended to orient States and other stakeholders in relation to the effective implementation of the right to participate in public affairs (see box IV.1).

Box IV.1
The United Nations Human Rights Council "Guidelines for States on the effective implementation of the right to participate in public affairs"

The guidelines set forth the following basic principles and requirements for the effective implementation of article 25 of the International Covenant on Civil and Political Rights on the right to take part in the conduct of public affairs, directly or through freely chosen representatives:

- Enabling environment

Requires States to create and maintain an environment where all human rights, particularly the rights to equality and non-discrimination, freedom of opinion and expression, and freedom of peaceful assembly and association, are fully respected and enjoyed by all individuals. Access to information should also be guaranteed.

- Safety

Requires that life, physical integrity, liberty, security and privacy of all individuals, including journalists and human rights defenders, be protected at all times.

- Equality

Requires rights to equality and non-discrimination to be protected and implemented to ensure inclusiveness in the exercise of the right to participate in public affairs.

- Empowerment

Requires support and encouragement of individuals, empowered and equipped with the knowledge and capacity to claim and exercise their rights to participate. States should encourage this through civic education programmes at all levels.

- Openness

Requires promoting transparency in all aspects of decision-making processes and accountability of public authorities.

- Remedies

Requires States to ensure access to justice and provide effective remedies when the right to participate is violated.

Source: Office of the United Nations High Commissioner for Human Rights (OHCHR).

[52] See general comment No. 25 of the Human Rights Committee and related jurisprudence.

[53] See Office of the United Nations High Commissioner for Human Rights (OHCHR), "Guidelines for States on the effective implementation of the right to participate in public affairs", Geneva, 2018 [online] https://www.ohchr.org/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web.pdf.

7.2. Each Party shall guarantee mechanisms for the participation of the public in decision-making processes, revisions, re-examinations or updates with respect to projects and activities, and in other processes for granting environmental permits that have or may have a significant impact on the environment, including when they may affect health.

The second paragraph of article 7 deals with public participation in activities and projects and other processes that require environmental permits. In other words, it governs the public's participation in decisions which authorize a particular proposed activity, project or action. This includes, by way of example, special planning decisions, construction and infrastructure permits or permits for discharges of pollutants as well as other administrative licenses, authorizations and permits. Both public and private initiatives are covered by this provision.

The provision requires each party to guarantee mechanisms for the participation of the public but leaves it up to each party to determine nationally what type of mechanism is used. What the Agreement requires is that such mechanisms and processes meet the standards provided for in the treaty.

Whether an activity or project falls under the scope of this provision or not is determined by an actual or potential significant impact on the environment, including effects on health. The concept of "significant impact" was deliberately not defined by the Agreement in order to cover the variety of existing domestic situations and enable each party to implement the provision according to its context. The requirement —at the national or subnational level— of an environmental impact assessment may be an indication as to the significance of this impact.[54] Depending on national law and circumstances, a "significant impact" could also be inferred from activities subject to biodiversity assessment or the requirement of specific permits on matters such as noise, emissions or logging. Other ways to determine the possibility of a significant impact of an activity or project include listing specific activities and projects or other parameters established at the domestic level, such as, inter alia, size, location, duration, magnitude of effects, probability or magnitude of cumulative impact, geographical area or potentially affected population.

Depending on the procedures followed nationally, the obligation to guarantee public participation may take place at different stages of the decision-making process. Parties may be required to have in place public participation mechanisms at several stages of the process, including design, beginning, development, operation or even termination and closing of activities and projects.

Furthermore, such public participation mechanisms shall be respected not only at the time of the issuing or granting of the original license, permit or authorization, but also in case of any future revision, re-examination or update. It should be made clear that the Agreement does not itself grant the members of the public the right to request a revision, re-examination or update of a decision, but rather provides for public participation mechanisms to be ensured when those revisions, re-examinations or update processes take place in the foreseen cases and when initiated pursuant to the corresponding national rules and procedures.

This paragraph, along with paragraphs 16 and 17 of the article, specifically refers to activities or projects. Nonetheless, the remaining general provisions of article 7 also apply, meaning that the rest of the requirements provided for in general terms for all types of environmental decision-making must be

[54] Usually, the "significant impact" becomes evident in the screening and scoping phases of the environmental impact assessment process.

respected, such as the possibility to participate from the early stages and the provision of the necessary information to the public in a clear, timely and comprehensive manner.

7.3. Each Party shall promote the participation of the public in decision-making processes, revisions, re-examinations or updates other than those referred to in paragraph 2 of the present article with respect to environmental matters of public interest, such as land-use planning, policies, strategies, plans, programmes, rules and regulations, which have or may have a significant impact on the environment.

This paragraph addresses public participation in all other decision-making processes in environmental matters other than those referred to in paragraph 2 on activities and projects. It recognizes that in addition to activities and projects, there are multiple decisions in the environmental field of public interest where public participation should be encouraged.

In a sense, this paragraph is residual in nature, as it encompasses all decisions and processes that have or may have a significant environmental impact other than those included in paragraph 2. By way of example, it cites several matters where countries of the region generally provide for public participation, such as land-use planning, policies, strategies, plans, programmes, rules, and regulations. This list is indicative and non-exhaustive, leaving it up to each party to apply and define accordingly.

Plans and programmes may include national development strategies and sectoral planning in energy, transport, the circular economy, tourism, air quality, disaster risk reduction and water management, for example, and may be proposed under different levels of government. In turn, rules and regulations normally refer to those issued by the executive branch, such as executive decrees, ordinances, and orders, but in the broader sense could also cover legally binding rules and the preparation of drafts for the legislative process before these are passed by the executive to the legislative bodies.

The main difference between paragraphs 2 and 3 lies with the verb used. Whereas under paragraph 2 parties are required to “guarantee” mechanisms for the participation of the public, in decisions relating to paragraph 3 the obligation is to “promote”, therefore using indicative rather than mandatory language. Consequently, parties have considerable flexibility in the implementation of the obligation in paragraph 3.

As in paragraph 2, the standard of paragraph 3 applies only to those decisions that have or may have a significant impact on the environment. In the case of the latter, such decisions should be subject to what is generally understood as strategic environmental assessments. Moreover, paragraph 3 also includes revisions, re-examinations or updates where public participation shall be promoted when these processes take place as explained under paragraph 2.

7.4. Each Party shall adopt measures to ensure that the public can participate in the decision-making process from the early stages, so that due consideration can be given to the observations of the public, thus contributing to the process. To that effect, each Party shall provide the public with the necessary information in a clear, timely and comprehensive manner, to give effect to its right to participate in the decision-making process.

One of the key aspects of public participation is the moment in which it occurs. Paragraph 4 focuses on when the engagement of the public shall take place, requiring that the public be able to participate from the early stages.

Early public participation has multiple benefits. In addition to enabling the public to meaningfully contribute to the process, it also allows the decision maker to give due consideration to any observation or representation made at a point when it is easier to make appropriate changes, including in the process itself. By engaging the public early, the decision maker should also be in a better position to anticipate, prevent and resolve any possible conflict.

The Agreement does not define the term "early stages", but the very nature of the public participation process demands that it take place while all options are open, when no decision has been made and the public's comments, improvements and alternatives can be conscientiously, genuinely, and thoroughly considered. Therefore, participation shall begin at the start of the process, when a decision is at its formative stage and early enough to have an effective impact on the decision being considered. The earlier the public is able to engage, the more effective its participation can be, allowing legitimacy and ownership and taking into account dissenting views.

To determine whether the opportunity to participate is granted early, one must review the entire decision-making process from inception to conclusion to identify when public participation should occur to fulfil its aim. Having absolute clarity as to when the decision-making process begins, and ends, is fundamental in this regard.

Often, it may be appropriate for a national legal framework to envisage public participation at more than one stage in a particular decision-making process. Complex decision-making processes may require opportunities for public participation to be provided separately in each relevant phase.

After determining the moment in which the public will participate, this provision refers to the obligation to provide to the public with the necessary information to ensure its effective participation. This obligation is further specified for all decisions under paragraph 6 of this article and, additionally, under paragraph 17 for activities and projects referred to in paragraph 2. The Agreement requires the information to be provided in a clear, timely and comprehensive manner. This means that the information related to the process shall be intelligible, complete and provided in due course for the purposes it is intended to fulfil. The Agreement allows parties to impose this obligation on different actors such as public authorities, the project proponent and third parties.

7.5. The public participation procedure will provide for reasonable timeframes that allow sufficient time to inform the public and for its effective participation.

As indicated previously, article 7 intends to make public participation meaningful by allowing the public to have a say in the decision-making process, whether on activities and projects under paragraph 2 or other environmental matters of public interest as per paragraph 3. The underlying rationale is to put in place the necessary conditions for that to happen and be effective, so that participation does not become a mere formality. As such, it requires that procedures incorporate reasonable time frames for the public to be informed, to prepare and effectively participate.

This obligation is closely linked to paragraphs 4 and 7 of article 7, on participation from the early stages, the right to present observations and their corresponding due consideration, as the reasonable time frames are both a precondition and a result of proper participation processes.

The use of the verb "will" denotes a binding obligation, equating to the verb "shall" used in other provisions of the Agreement. This obligation applies to all stages of the decision-making process, including the provision of information to the public (paragraphs 6 and 17), the public's right to present observations and the public authorities' duty to duly consider them (paragraph 7), and the obligation to inform the public of the decision and make it accessible and public (paragraph 8).

There is no single definition of a time frame that is generally considered reasonable, so timeliness depends on each specific process and the type of decision as well as the given context. Adequate time frames shall consider the quantity and quality of the information to be provided, the nature of the decision to be taken and the preparation required to participate meaningfully in the process.

The time frames should likewise be compatible with those pertaining to public access to the relevant information. When establishing time frames, other social considerations must also be borne in mind, such as weekends and holidays.

Furthermore, adequate time frames must factor in the specific circumstances of specific groups and individuals, which may reflect different levels of literacy, language or other particular difficulties, objectively placing them at a disadvantage. Time frames may need to be adapted accordingly to ensure they are reasonable and in keeping with paragraph 10.

Reasonable time frames shall (i) enable the public to have at its disposal all the information needed, but also to examine and understand the information and to form an opinion on the subject; (ii) allow the public enough time to express views and prepare for any procedures, meetings, consultations or hearings foreseen, considering social, economic, cultural, geographical and gender characteristics and (iii) allow comments and observations to be duly taken into account by the decision maker. All of these contribute to the overall effectiveness of the public participation process, legitimize the decision and generate buy-in and ownership.

As set out under paragraph 6, the public shall also be informed of these time frames and opportunities for public participation. Moreover, such reasonable time frames must be respected at all stages when public participation is envisaged. In other words, if public participation is foreseen at several stages of the process, each step must reflect this reasonability standard.

7.6. The public shall be informed, through appropriate means, such as in writing, electronically, orally and by customary methods, and in an effective, comprehensible and timely manner, as a minimum, of the following:
(a) the type or nature of the environmental decision under consideration and, where appropriate, in non-technical language;
(b) the authority responsible for making the decision and other authorities and bodies involved;
(c) the procedure foreseen for the participation of the public, including the date on which the procedure will begin and end, mechanisms for participation and, where applicable, the date and place of any public consultation or hearing; and
(d) the public authorities involved from which additional information on the environmental decision under consideration can be requested and the procedure for requesting information.

To be effective, public participation requires information on the decision-making process and the possibilities to participate in it, as along with all relevant information on the proposed decision itself, to be available to the public so that it can make informed comments. Paragraph 6 specifically safeguards the right

of the public to be informed of a minimum of core elements for that purpose. These core elements apply to all types of decision, whether they pertain to activities and projects under paragraph 2 or other environmental decision-making processes under paragraph 3.

The paragraph uses the passive voice, allowing parties to place the obligation on different actors. Depending on the context, in some cases the onus may be placed on the public authority responsible for taking the decision, while in others it may be more suitable for this obligation to be fulfilled by other authorities, bodies or even the applicant. The duty of each party is to ensure the obligation is discharged and carry out oversight and guarantor functions.

This paragraph indicates that information shall be provided through appropriate means, listing some of the methods that would be admissible: in writing, orally, electronically or by customary methods. Either one or a combination of these may be used, as appropriate, once or multiple times. The reference to electronic, oral and customary methods highlights the importance of the provision of information being as fit for purpose as possible, taking into account the characteristics of the public and facilitating its participation. Both public notice and individual notification are included in the paragraph.

The provision of information must also be effective, comprehensible and timely. Effectiveness refers to the need to meet the intended objectives. Therefore, the method of disseminating information to the public should be adequate, accessible and should encourage public participation. In other words, all potentially affected persons must have a reasonable chance of knowing about the public participation procedures in place and being involved in the decision-making process. The information must also be understandable, available in locally relevant forms and thus comprehensible for a general and specific audience. Moreover, the information shall also be provided early enough for participation to be meaningful.

With regard to the actual content of the information to be provided, at a minimum, the public must be provided with four elements: (i) the type or nature of the decision; (ii) the authority responsible for taking the decision and others involved; (iii) the procedure foreseen for public participation and (iv) the public authorities from which additional information can be requested. Nothing prevents a party from going beyond these minimum requirements and providing additional information to the public.

Several aspects are worth noting. First, the use of non-technical language when appropriate to inform on the nature or type of decision, which seeks to ensure all members of the public have clarity on what will be decided. Second, the reference to other bodies and authorities different from those taking the final decision that may be involved, so as to enable full comprehension by the public of the process and enable it to liaise with these bodies and authorities when required to obtain additional information. It may well be the case that an authority is involved in the process but is not responsible for taking the final decision, which is a relevant aspect for the public to be aware of. Third, the specifics relating to the public participation procedure, which include the date on which the procedures begin and end, the mechanism foreseen and the dates and places of public consultations or hearings, should that be the case. These dates should be compatible with the requirements under paragraphs 4 and 5 (early stages and reasonable time frames).

7.7. The public's right to participate in environmental decision-making processes shall include the opportunity to present observations through appropriate means available, according to the circumstances of the process. Before adopting the decision, the relevant public authority shall give due consideration to the outcome of the participation process.

In order to participate in the environmental decision-making processes, paragraph 7 recognizes a right and an obligation with respect to public views. On the one hand, the public is entitled to make comments and observations through the appropriate means available. On the other, public authorities are obliged to give due consideration to these observations and the outcome of the participation process.

The right to make comments is the channel through which the public freely expresses any view, suggestion, and concern it considers appropriate with respect to a proposed decision. All comments on any issue of relevance to the decision shall be permitted.

The fact that such observations may be provided through appropriate means available according to the circumstances of the process highlights the need to consider the nature and context of the process and the specific situation of the public. The provision offers ample room for parties to comply with this right in practice. Comments can be allowed in writing, orally or through other means, in person, remotely or virtually. The public may also provide input in public hearings and consultations, orally or in writing, among others. Therefore, a combination of these means is permitted.

The obligation to duly consider the public's comments before adopting a decision is a basic premise of true and meaningful participation. The need to "give due consideration" to the public's comments does not grant the public veto power nor does it shift the responsibility for taking the decision from the public authority to the public. Furthermore, the Agreement does not establish that the result of the public participation process is binding on the public authority and thus, the decision maker retains its full competence, power and authority, in accordance with applicable law, to make the final decision as it considers appropriate.

However, the treaty does require that authorities properly and conscientiously review, assess and consider the objections and representations of the public. The authority must be open to being eventually persuaded by the arguments of the public and be able to modify its position or opinion accordingly. In some cases, as a result of the public participation procedure, the respective authority may decide to amend a proposal, determine additional measures or alternative options, or even decide not to authorize or carry out the proposal (generally known as the "no option" or "zero option").

Nonetheless, the relevant authority is by no means obliged to accept all comments received or to change the decisions in light of every or any comment. As indicated, the public does not have a right to veto the decision. It can actually be quite difficult if not impossible to satisfy all comments, as many may conflict with one another. In this sense, public participation as recognized in the Escazú Agreement does not entitle the public to have the final say or enable it to accept or reject a decision.

The specific way in which contributions are duly weighted will be determined by each party. However, the public authority must justify its decision, showing how and why a particular observation was accepted or rejected.

The public authority may give due account to the public's comments in different ways. Written comments may be registered. Public hearings may be recorded and transcripts used. Similar observations may be clustered or grouped together. Feedback may be provided to participants individually or through general publications on the decision-making authority's consideration of the public's comments. Public authorities may also choose to meet members of the public to better understand the concerns raised and explain how they were considered. A good way to demonstrate that the comments were actually considered is for the decision maker to give the reasons for each specific comment received and explain how it was taken into

account and why it was accepted or rejected, or how it was incorporated into or affected a decision or not. It is also possible for the public authority to address all the concerns raised by the comments —that is, rather than address each comment specifically, address categories or types of concern raised by the comments. Overlapping or shared concerns may be addressed all at once.

The obligation to take into account the comments of the public is directly correlated with paragraph 8 of article 7, which requires the public to be informed of the decision, grounds and underlying reasons, including how the observations of the public have been taken into consideration. It is also linked to early public participation and reasonable time frames, as it is only when participation takes place in a timely manner that the comments and views of the different members of the public can be rightfully considered.

7.8. Each Party shall 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.
7.9. The dissemination of the decisions resulting from environmental impact assessments and other environmental decision-making processes in which the public has participated shall be carried out through appropriate means, which may include written, electronic or oral means and customary methods, in an effective and prompt manner. The information disseminated shall include the established procedure to allow the public to take the relevant administrative and judicial actions.

Paragraphs 8 and 9 of this article deal with the final stage of the decision-making process: the rendering of a decision and its dissemination. Focus is placed on the public, reasoned and accessible nature of the decision, setting out part of the content and the means through which it shall be disseminated. Though referring to two distinct legal obligations, both paragraphs are closely related and can be grouped together.

The aforementioned provisions include common standards of administrative law. Decision makers are accountable for their decisions and these must follow due process, be reasoned, justified or motivated and publicly accessible. Generally, a clear record of the administrative process is required. This record should include a specific description of how the process provided opportunity for public participation, giving account of the actions and procedures carried out, any intermediate steps, and the results achieved. This record not only provides historical insight but also allows for future reviews, appeals and monitoring of the decision.

Giving reasons for decisions is likewise advantageous in many ways. Apart from requiring the decision maker to thoroughly formulate, systematize and explain its conclusions and actions, it provides evidence of the procedure and methodology followed, contributing to the reliability of the decision. This explanation may also assist future authorities in dealing with similar cases or circumstances and facilitate consistency, clarity and regularity in public policy. It further increases confidence in the decision, transparency and accountability, minimizing errors, illegalities and arbitrariness, and enables a better understanding by the public of the grounds and reasoning behind the action in question.

The Agreement stresses that giving reasons for a decision includes indicating how the observations of the public were taken into consideration. As noted previously, this is of fundamental importance to ensure compliance with paragraphs 4 and 7 of article 7. By seeing how their comments and observations were handled, the members of the public will not only be able to trace the response given to their own insights but also see how others' inputs were considered. In addition, the procedures for the public to take relevant administrative and judicial actions must be a part of the information disseminated.

Several mutually reinforcing parameters are established to inform about and disseminate the decision. These include timeliness, accessibility, appropriateness, effectiveness and promptness. As a result, dissemination shall take place in a timely and prompt manner, without undue delays, through appropriate formats and shall be effective in informing the target audience. Timeliness includes the possibility to be informed about and use relevant and applicable appeal mechanisms.

Decisions may be publicized and disseminated in various ways, including through public registers and environmental information systems and public or direct notification. Means shall be appropriate and may include written, electronic, oral or customary methods, depending on each case.

7.10. Each Party shall establish conditions that are favourable to public participation in environmental decision-making processes and that are adapted to the social, economic, cultural, geographical and gender characteristics of the public.

In keeping with the mandate to ensure open and inclusive participation and engage the greatest number of members of the public, particularly those in vulnerable situations, paragraph 10 requires parties to establish conditions that are favourable for the public's participation and are adapted to its characteristics. However, these conditions and adaptations cannot, forcibly, lead to a lower standard of public participation than that set out in the Agreement for the general public.

The particular consideration of the characteristics of the rights-holders in the exercise of rights is a fundamental component of a rights-based approach and may be considered a general cross-cutting guideline of the Agreement. It is also at the heart of the Agreement's effectiveness, for its objective will be fully achieved only if the rights enshrined are implemented through means and processes that are tailored to the situation, circumstances and needs of its beneficiaries.

With regard to public participation in environmental decision-making, several elements of other paragraphs of article 7 contribute to the establishment of favourable conditions and adaptation to the characteristics of the public. Tangible examples are the obligation to provide the necessary information for meaningful participation in a clear, timely and comprehensive manner through appropriate means, including electronically, orally or by customary methods, the reasonability of time frames and the opportunity to present observations through appropriate means.

Information and communications technologies are increasingly used to carry out public participation processes in environmental matters, such as e-participation, e-consultation and the possibility to submit observations in electronic formats.[55] These virtual spaces may provide new opportunities for public participation, but care shall also be taken to ensure that these platforms and means do not constitute barriers to participation. The same rights and obligations apply online and offline and, as mandated by article 4.9 of the Agreement, in no circumstances shall the use of electronic media constrain or result in discrimination against the public. Specific measures may also be required to make information and communications technologies widely available, particularly for persons or groups in vulnerable situations.

However, the importance of this paragraph lies in the general obligation to establish conditions and adapt processes and in its specific focus on five characteristics of the public that are essential for public

[55] See the United Nations, *E-Government Survey 2020: Digital Government in the Decade of Action for Sustainable Development. With addendum on COVID-19 Response, New York, 2020*.

participation: social, economic, cultural, geographical and gender. This includes paying attention, inter alia, to the income and literacy levels of the public, cultural diversity, rurality, remoteness or distance and gender. These characteristics are closely linked to the definition of persons or groups in vulnerable situations in article 2 and the specific provisions related to this category in other articles of the Agreement, such as articles 4.5, 5.3, 5.4, 6.6 and 8.5.

There are multiple ways through which States parties may ensure such conditions are met. For example, dates and times of public hearings and consultations may be adapted to specific segments of the population; accessible locations may be chosen or different locations offered (e.g. meetings in capital cities, other cities and towns and rural locations); means of transportation may be provided or reimbursed; meetings may be conducted in different languages and according to suitable methodologies; and gender appropriate mechanisms may contribute to equal participation between men and women.

7.11. When the primary language of the directly affected public is different to the official languages, the public authority shall ensure that means are provided to facilitate their understanding and participation.

Given the diversity and multicultural nature of the countries of Latin America and the Caribbean, it is not uncommon for local populations in a given territory to have multiple languages. When these languages are different from the official ones, language barriers may arise, posing a significant challenge to meaningful and effective public participation.

To overcome this situation, this paragraph builds on the previous provision and specifies the obligation to provide means that facilitate the understanding and participation of the directly affected public that has a primary language other than the official languages.

The Agreement requires these special efforts to be made only with regard to those members of the public that are directly affected by a given decision. It may be considered a subcategory within the general concept of the public set out under article 2. These members of the public are those directly affected or likely to be directly affected by the decision and as such have a specific interest in the matter in question. In that regard, it is even more important for their participation to be enhanced. The scope of the term “directly affected public” will depend on the particular activity or decision to be taken and may very well encompass a significant number of persons. The term is also found in paragraph 16 of article 7.

The means to be provided to meet the obligation under this paragraph may vary, from the conduct of the processes in different languages, to the use of non-technical language, the provision of translation and interpretation services or the use of customary or local methods that facilitate comprehension and engagement.

7.12. Each Party shall promote, where appropriate and in accordance with domestic legislation, public participation in international forums and negotiations on environmental matters or with an environmental impact, in accordance with the procedural rules on participation of each forum. The participation of the public at the national level on matters of international environmental forums shall also be promoted, where appropriate.

Paragraph 12 deals with the international dimension of public participation. On the one hand, it addresses public participation in international forums and negotiations. On the other, it focuses on the participation of the public at the national level on matters of international environmental forums.

To maintain consistency between national and international actions and in alignment with the tenets of the Agreement, parties are encouraged to promote public participation both in international forums and in national instances where such matters are discussed.

The verb "promote" and the qualifiers used throughout the paragraph clearly point to its guiding and flexible character and limit the scope of the obligation. Public participation shall be promoted where appropriate and in accordance with domestic legislation and with the procedural rules on participation of each forum.

The paragraph indicates two types of international forums and negotiations where such public participation shall be promoted: those involving environmental matters and those with an environmental impact. The first category includes forums such as conferences or meetings aimed at the negotiation of multilateral environmental agreements and Conferences of the Parties after such agreements have entered into force. The second category refers to other areas which may not be exclusively environmental but that have effects on environmental issues, such as health, human rights, trade and sustainable development.

In turn, at the national level, public participation shall be promoted as appropriate where matters of international environmental forums are addressed. This includes multi-stakeholder committees, councils or other platforms that may exist nationally to prepare a country's position or follow up on international commitments and developments.

As international decision-making increasingly involves hybrid and virtual platforms, public participation procedures have also transitioned to the digital world, opening new avenues for positive and meaningful engagement. However, potential barriers relating to these formats, including language, connectivity and accessibility, must be carefully considered and overcome.

The promotion of public participation under this paragraph is closely related with the general provision included in 4.10, which indicates that parties may promote knowledge of the provisions of the Agreement in other international forums related to environmental matters, in accordance with the rules of each forum.

7.13. Each Party shall encourage the establishment of appropriate spaces for consultation on environmental matters or the use of those that are already in existence in which various groups and sectors are able to participate. Each Party shall promote regard for local knowledge, dialogue and interaction of different views and knowledge, where appropriate.

Public participation may take place through appropriate spaces for consultation. Most countries of the region have established committees, councils, bodies or other formal permanent platforms that represent a variety of experts and stakeholders and that serve the purposes of providing advice, consultation and coordination, usually with regard to policies, plans, programmes and strategies.

Paragraph 13 encourages the establishment of such bodies where they do not exist and the use of those already in existence, and sets certain guidelines. These spaces shall be appropriate and allow for the participation of various groups and sectors, including women, young people and indigenous peoples, among others. The Agreement does not specify the exact functions of these platforms or their specific composition, or whether representatives act in a personal capacity or on behalf of groups and organizations, leaving these details for national determination and development.

There may be several formal spaces for consultation and all or some of them may be exclusively environmental, focus on specific areas of environmental management (e.g. climate change, biodiversity, forests, land or water), or be general in nature but allow for discussion of environmental issues (e.g. bodies on sustainable development, socio-environmental policy or planning). These platforms may be foreseen at the national and subnational levels.

An important component of these bodies and of public participation in general shall be the promotion of local knowledge and dialogue and interaction of views. Cognizant of the critical role and richness of local knowledge and diversity for environmental management, the Agreement encourages States to promote their integration into policy and decision-making. Community knowledge is also directly linked to indigenous communities that have profound experience and practice in safeguarding and nurturing a culture of understanding, respect and harmony with nature.

7.14. The public authorities shall make efforts to identify and support persons or groups in vulnerable situations in order to engage them in an active, timely and effective manner in participation mechanisms. For these purposes, appropriate means and formats will be considered, in order to eliminate barriers to participation.

As part of the cross-cutting consideration of persons and groups in vulnerable situations present throughout the Agreement and in order to ensure the broad and meaningful participation of all sectors of society on the basis of equality and non-discrimination, paragraph 14 of article 7 requires public authorities to take affirmative action with respect to persons or groups in vulnerable situations, identifying and supporting them and removing barriers to their participation.

Persons and groups in vulnerable situations are defined in article 2 and are considered to face particular difficulties in exercising their rights owing to their circumstances or conditions in each national context and to each party's international obligations.

To "make efforts" is an obligation of conduct and not of result, thus qualifying the scope of the paragraph. Making these efforts is, however, mandatory, and shall be aimed at determining who is in a situation of vulnerability in accordance with the definition provided under article 2 for the purposes of the right to public participation and providing them with the necessary assistance. To that end, the specific obstacles and barriers faced by these persons and groups should be identified to devise the best support mechanisms.

Identifying and supporting these persons aims to ensure their active, timely and effective participation. These objectives will be reached when the treaty's standards for public participation are met. In other words, when these persons are able to participate in an open and inclusive manner from the early stages, within reasonable time frames and with access to minimum information, and are able to make observations which are duly considered and receive notification of and access to the decision. Additionally, procedures must be adapted to the characteristics of the public and appropriate spaces for consultation on environmental matters, with due regard for local knowledge, dialogue and interaction of different views and knowledge, shall be encouraged.

Finally, the provision highlights the consideration of appropriate means and formats that the article has previously included regarding information to participate in the decision-making process (paragraph 6); the presentation of observations (paragraph 7); and the dissemination of the decision (paragraph 9).

7.15. In the implementation of the present Agreement, each Party shall guarantee that its domestic legislation and international obligations in relation to the rights of indigenous peoples and local communities are observed.

The rights of indigenous peoples are expressly safeguarded in specific international instruments, such as the International Labour Organization's Indigenous and Tribal Peoples Convention, 1989 (No. 169), the 2007 United Nations Declaration on the Rights of Indigenous Peoples and the 2016 American Declaration on the Rights of Indigenous Peoples, and in national constitutional and legal frameworks. The rights guaranteed by such instruments include the right to free, prior and informed consent of indigenous peoples.

Considering the relevance of public participation and access rights to uphold indigenous peoples' rights while respecting the autonomous and individual legal nature of the national and international commitments assumed by each party, the Escazú Agreement limits itself to reaffirming the obligation of each party to guarantee the observance of their respective domestic and international obligations with regard to indigenous peoples.

As a result, in terms of indigenous peoples' rights, the Escazú Agreement —which is broad and general in nature, applicable to all sectors of society as a whole— remits expressly to and complements their specialized framework. In that regard, the Agreement does not affect the implementation of other international treaties in force. It is applied synergistically with respect to all matters that are not regulated by it and that are not contrary to or incompatible with it. Since the Escazú Agreement does not contain any provision on successive treaties or regulating inter-treaty relationships, the general rules of treaty law shall apply, such as those included in article 30 of the Vienna Convention on the Law of Treaties or in customary law.

This paragraph must also be read in conjunction with article 4.7, which stipulates that the Escazú Agreement is a floor and not a ceiling and allows parties to grant more favourable rights and guarantees and a broader access to environmental information, participation in environmental decision-making and justice in environmental matters.[56]

Furthermore, guaranteeing the rights of indigenous peoples recognized by a party at the national and international levels is consistent with the obligations set out under paragraphs 11 and 13 of article 7, referring to the languages of the directly affected public and the promotion of local knowledge and views. Indigenous peoples could be considered, in a given context, persons and groups in vulnerable situations, therefore making paragraph 14 relevant.

The relevance of the Escazú Agreement for indigenous peoples is summarized in box IV.2.

[56] For example, some countries have granted the United Nations Declaration on the Rights of Indigenous Peoples binding force at the national level (e.g. the Plurinational State of Bolivia through Law No. 3760 of 2007).

Box IV.2
Relevance of the Escazú Agreement for indigenous peoples

- Recognition of the multiculturalism of Latin America and the Caribbean and of their peoples (preamble).
- Guarantee of an enabling environment for indigenous peoples that defend the environment, their land and territories, giving them recognition and protection (articles 4.6 and 9).
- Each party shall encourage the use of new information and communications technologies, such as open data, in the different languages used in the country, as appropriate (article 4.9).
- Indigenous peoples should receive assistance to formulate their requests and obtain a response (article 5.4).
- Dissemination of environmental information in the various languages used in the country, and preparation of alternative formats understandable for said groups, through adequate communication channels (article 6.6).
- Each party shall establish favourable conditions to ensure that public participation in environmental decision-making processes is adapted to the social, economic, cultural, geographical and gender characteristics of the public (article 7.10).
- When the directly affected public mainly speaks languages other than the official ones, the public authority will ensure that their understanding and participation is facilitated (article 7.11).
- Appropriate spaces for consultations shall be encouraged and the regard for local knowledge, dialogue and interaction of different views and knowledge shall be promoted, where appropriate (article 7.13).
- In implementing the Agreement, each party shall guarantee respect for its national legislation and its international obligations regarding the rights of indigenous peoples and local communities (article 7.15).
- Use of interpretation or translation from languages other than official languages when necessary for the exercise of the right of access to justice (article 8.4).

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of the Escazú Agreement.

This provision also safeguards the rights of local communities. The ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) refers not only to indigenous peoples but also to tribal peoples.[57] Moreover, the Convention on Biological Diversity,[58] the Convention to Combat Desertification[59] and the Paris Agreement[60] mention "local communities". In the Inter-American system, the same rights have been recognized for some communities of African descent as for indigenous peoples.[61]

[57] Tribal peoples are understood to live in social, cultural and economic conditions that distinguish them from other sections of the national community, and those whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

[58] See article 8(j) of the Convention on Biological Diversity: "Each Contracting Party shall, as far as possible and as appropriate: […] (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices: […]."

[59] See article 3(a) of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa: "In order to achieve the objective of this Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following: (a) the Parties should ensure that decisions on the design and implementation of programmes to combat desertification and/or mitigate the effects of drought are taken with the participation of populations and local communities and that an enabling environment is created at higher levels to facilitate action at national and local levels; […]."

[60] See the preamble of the Paris Agreement. In the framework of the United Nations Framework Convention on Climate Change, a Local Communities and Indigenous Peoples Platform (LCIPP) has also been established.

[61] See Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, San Jose, 2007.

7.16. The public authority shall make efforts to identify the public directly affected by the projects or activities that have or may have a significant impact on the environment and shall promote specific actions to facilitate their participation.

Paragraph 16 builds on the previous paragraphs focusing on the directly affected public. Given that persons may be directly affected in both positive and negative ways, these members of the public include those that have or are likely to experience a direct benefit or burden as a result of the decision.

As with persons and groups in vulnerable situations under paragraph 14, public authorities shall "make efforts" to identify and promote specific actions to facilitate the participation of those directly affected. The definition of the persons included within this group is based on a factual relationship. While parties have some discretion to determine whether that relationship exists, they cannot define the "directly affected public" in ways that are evidently contrary to the facts.

In terms of the actions to be taken to facilitate participation, these should be proactive and deliberate to encourage the participation of the directly affected public and seek to overcome any existing barrier to their participation. These measures coexist and complement those implemented for persons or groups in vulnerable situations under paragraph 14.

The directly affected public is only referred to in the context of activities and projects that have or may have a significant impact on the environment, and thus have a direct link with paragraph 2 of article 7.

7.17. With respect to the environmental decision-making processes referred to in paragraph 2 of the present article, as a minimum, the following information shall be made public:
(a) a description of the area of influence and physical and technical characteristics of the proposed project or activity;
(b) a description of the main environmental impacts of the project or activity and, as appropriate, the cumulative environmental impact;
(c) a description of the measures foreseen with respect to those impacts;
(d) a summary of (a), (b) and (c) of the present paragraph in comprehensible, non-technical language;
(e) the public reports and opinions of the involved entities addressed to the public authority related to the project or activity under consideration;
(f) a description of the available technologies to be used and alternative locations for executing the project or activity subject to assessment, when the information is available; and
(g) actions taken to monitor the implementation and results of environmental impact assessment measures.

The aforementioned information shall be made available free of charge to the public in accordance with paragraph 17 of article 5 of the present Agreement.

Paragraph 17 establishes certain minimum information that shall be made public in cases of activities and projects that have or may have a significant impact on the environment referred to under paragraph 2 of article 7.

The list is in addition to the general requirements applicable to any environmental decision-making process under paragraph 6, which refers to the type or nature of the decision, the authority responsible for taking it and others involved, and the procedure foreseen for public participation. It refers to the relevant and available

information that must be accessible to the public. As in the case of paragraph 6, this is a statement of "minimum" requirements, meaning that parties may provide additional information if deemed appropriate.

Seven items make up what is considered the core information that shall be provided in such cases. The first four items refer to the main aspects of the activity or project, including the area of influence, physical and technical characteristics, main environmental impacts and measures foreseen in respect of the same. A summary of these in comprehensible, non-technical language is also required, allowing non-specialized audiences to grasp the nature and implications of the proposed decision. Next, (e) includes public reports and opinions of the different entities that have been submitted to the public authority and (f) refers to the available technologies and alternative locations for the project or activity, when the information is available. The list ends with the actions taken to monitor the implementation and results of environmental impact assessment measures.

As in some previous provisions, the language of the paragraph uses the passive voice: "shall be made public". Although this is usually an obligation of authorities, the article allows each party to define whether the project proponent or the public authority will be required to make the information public. Nonetheless, it is clear that each party has the oversight and overall responsibility to ensure that the requirements of this provision are met.

The Agreement specifies that the aforementioned information shall be made available free of charge in accordance with paragraph 17 of article 5.

The other applicable standards on access to information likewise apply to this information, such as the grounds for the refusal of access and the conditions applicable to the delivery of information. It can also be inferred that the same conditions established under paragraph 6 of article 7 apply, that is the need to provide the information in an effective, comprehensible and timely manner.

V. Access to justice in environmental matters

The right to access justice in environmental matters is the third access right covered by the Escazú Agreement. It is addressed in article 8 and entails the provision of procedures remedies mechanisms to enforce the rights recognized in the Agreement.

Although access to justice is as an independent right in and of itself, it is also a key enabler of the full and effective exercise of the other access rights. As a result, it is the primary means of seeking enforcement of and compliance with the provisions of the Escazú Agreement.

Under the treaty, access to justice grants the possibility of legal review procedures on three grounds:

(i) Access to environmental information.
(ii) Public participation in the decision-making process regarding environmental matters.
(iii) Occurrence or possibility of environmental damage or the violation of laws and regulations related to the environment.

Under the Agreement, access to justice is understood in broad terms, that is, not limited to judicial means, but also inclusive of administrative and other non-judicial methods that may be available to resolve an environmental controversy, such as alternative dispute resolution mechanisms. Each party shall ensure access to justice in the framework of its domestic legislation and guarantee the right in accordance with the guarantees of due process. Every person must have equal rights and possibilities of accessing justice to enforce their rights through effective, timely, public, transparent and impartial procedures that are not prohibitively expensive.

Article 8 aims to provide an array of effective tools for both seekers and adjudicators of environmental justice. For example, it requires each party to have, considering its circumstances, competent State entities with access to expertise in environmental matters and the possibility of ordering precautionary and interim measures to prevent, halt, mitigate or rehabilitate environmental damage. This pillar of access to justice in environmental matters aims to address some of the particularities of environmental cases and overcome some of the most important obstacles faced in this field, including the issues of standing to challenge a violation of rights, to prevent or limit environmental harm or to enforce the law, and the cost and particular barriers faced by persons and groups in vulnerable situations. Access to justice thus contributes at the same time to safeguarding the right to a legal response in case of violations, allowing authorities to be held to account and strengthening each party's ability to implement and comply with the treaty's obligations. In addition, access to justice is the cornerstone of environmental rule of law, increasing public trust and confidence in public decision-making.

Table V.1 provides an overview of the main obligations contained in article 8 and practical guidance for its implementation.

Table V.1
Main obligations contained in article 8 of the Escazú Agreement and implementation guidance

Provision	Obligation	Implementation guidance
Paragraph 1	Guarantee the right of access to justice in environmental matters	- In accordance with the guarantees of due process
Paragraph 2	Ensure access to judicial and administrative mechanisms to challenge and appeal with respect to substance and procedure	- In the framework of domestic legislation - With respect to three grounds: access to environmental information, public participation and adverse effects on the environment or violation of environmental laws and regulations
Paragraph 3	Have in place certain conditions to guarantee the right of access to justice in environmental matters	- Considering the circumstances of each party - The conditions are varied, and include institutional, procedural and technical and legal elements
Paragraph 4	Establish certain measures, means and mechanisms to facilitate access to justice in environmental matters	- Applies to the public at large - Measures, means and mechanisms aim to minimize or eliminate barriers, publicize the rights of access and procedures, systematize and disseminate decisions and ensure the use of interpretation or translation
Paragraph 5	Meet the needs of persons and groups in vulnerable situations	- Give effect to the right of access by establishing support mechanisms - Support mechanisms may include, as appropriate, free technical and legal assistance
Paragraph 6	Ensure that adopted decisions and their legal grounds are set out in writing	- Applies to judicial and administrative decisions - Key component of access to justice
Paragraph 7	Promote alternative dispute resolution mechanisms in environmental matters	- As appropriate - Includes mediation, conciliation or other means to prevent or resolve disputes

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of the Escazú Agreement.

A. Article 8 – Access to justice in environmental matters

8.1 Each Party shall guarantee the right of access to justice in environmental matters in accordance with the guarantees of due process.

The first paragraph of article 8 follows the same pattern as that of articles 5 and 7 on access to environmental information and public participation in the environmental decision-making process, respectively. It contains a direct, general reaffirmation of an already recognized right, in this case, access to justice in environmental matters. The use of the authoritative verb “guarantee” must be highlighted inasmuch as it encompasses the general duty of any State party to take positive action at the domestic level. The content relating to the guarantee of this right is set out in the subsequent paragraphs of the article.

The right to access justice is rooted in international human rights law and domestic law. Under international human right law, everyone is entitled to have his or her rights and obligations determined by an independent and impartial tribunal.[62] Target 3 of Sustainable Development Goal 16 also includes the promotion of the rule of law at the national and international levels and equal access to justice for all. Furthermore, international human rights instruments establish the right to an effective judicial remedy for any violation of fundamental rights recognized therein.[63]

The right to access justice in environmental matters shall be applied in accordance with the guarantees of due process. Procedural fairness may be considered the core aspect of access to justice, ensuring the right to equality before courts and tribunals and to a fair trial. The content of due process guarantees has been extensively set out in international human rights law and national law, usually recognized at the constitutional level and in specific procedural rules. To ensure due process, the administration of justice must fulfil a specific set of indispensable, minimum and non-derogable rights and guarantees of equality of arms, fair treatment and non-discrimination between the parties to a given proceeding. In the judicial arena, these guarantees include the independence and impartiality of judges, the right to a fair hearing with due guarantees and within a reasonable time, by a competent court previously established by law, the right of defence and to legal representation and the right to appeal the judgment to a higher court, among others. As a result, due process represents both a safeguard for justice seekers to be treated in accordance with established rules and principles and a strict obligation of conduct on the part of administrators of justice, which must guide and, to a certain extent limit, the latter's actions.

Since the Escazú Agreement refers to judicial, administrative or other means to access remedies, due process guarantees shall be adapted to each of these contexts. For example, full and absolute institutional independence may not be materially possible in administrative mechanisms which allow a decision to be reviewed internally by the same authority or a higher body having authority over the inferior body, but due process may be observed through clear, fair and impartial procedures, the right to a fair hearing or the autonomy of the review mechanism. The substantive basis of this due process, however, must be guaranteed regardless of the means used to recur to justice under the Agreement.

> 8.2 Each Party shall ensure, in the framework of its domestic legislation, access to judicial and administrative mechanisms to challenge and appeal, with respect to substance and procedure:
> (a) any decision, action or omission related to the access to environmental information;
> (b) any decision, action or omission related to public participation in the decision-making process regarding environmental matters; and
> (c) any other decision, action or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment.

The second paragraph determines the scope of the right to access justice in environmental matters. The provision clearly establishes that such access must be granted in the framework of the domestic legislation of each party, meaning that national bodies and mechanisms are the ones required to ensure this right. It is

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[62] Article 10 of the Universal Declaration of Human Rights states "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". This right is also recognized in article 14 of the International Covenant on Civil and Political Rights and in article 8 of the American Convention on Human Rights.

[63] Article 8 of the Universal Declaration on Human Rights establishes that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." A similar guarantee is set forth under article 2.3 of the International Covenant on Civil and Political Rights and article 25 of the American Convention on Human Rights. In Advisory Opinion OC-23/17, the Inter-American Court of Human Rights has also analysed the right of access to justice in environmental matters (paragraphs 233–237).

also indicated that mechanisms may be judicial or administrative. However, administrative mechanisms are not intended to replace, preclude or prevent the opportunity for judicial review. The Agreement does not mandate a specific means or jurisdiction for a specific case, leaving parties ample flexibility to determine these aspects within their domestic frameworks.

The right to access justice includes challenging and appealing a decision, action or omission. This implies that before having the possibility to challenge, one of two situations must occur: (i) either there is a previous decision or action or (ii) there is an abstention or a failure to act when there was an obligation to do so. The latter would include administrative silence or non-opposition. In addition, the article does not refer to the author or entity of this decision, action or omission, and as such, the duty bearer shall depend on each national context. The issuance of a decision by a non-competent entity, would, in any case, be grounds for a challenge and an appeal.

Furthermore, access to justice may be sought both on substantive and procedural grounds. Whereas substantive grounds refer to the overall basis or substance of a decision (legal correctness in substance), procedural grounds relate to any supposed flaw in the manner in which a particular decision was made. Although the difference between substance and procedure may be significant in specific contexts or proceedings, no particular distinction is made between the two in the Escazú Agreement, and the same standards are applied to both. In that regard, any conflict between substance or procedure would be irrelevant for the purposes of this article as it would fall under the grounds for legal review.

The use of the verbs “challenge” and “appeal” must be understood with a certain degree of flexibility. Although both concepts have a similar ordinary meaning, their use may vary across the region. In some jurisdictions, they may be used interchangeably. In others, their use may depend on the nature of the proceeding, depending on whether it is judicial or administrative. An appeal may also entail the right to a second hearing by a superior body or court, which is considered part of due process. All these possibilities are accepted under the Agreement. Their definition must be interpreted in the framework of domestic legislation.

The paragraph foresees three specific areas subject to legal review:

(a) Any decision, action or omission related to the access to environmental information.
(b) Any decision, action or omission related to public participation in the decision-making process regarding environmental matters.
(c) Any other decision, action or omission that affects or could affect the environment adversely or violate law and regulations related to the environment.

The first area refers to access to environmental information. It should be recalled that paragraph 2(c) of article 5 of the Agreement considers that the exercise of the right of access to environmental information includes “being informed of the right to challenge and appeal when information is not delivered, and of the requirements for exercising this right.” Furthermore, paragraph 14 of article 5 states that when the competent authority does not respond within the established periods, paragraph 2 of article 8 shall apply. Access to justice would be available in case a request for environmental information has been unreasonably refused wholly or in part, or inadequately handled according to the applicable law.

Although paragraph 18 of article 5 of the Agreement contains the obligation to establish or designate one or more impartial entities or institutions with autonomy and independence to oversee compliance and guarantee the right of access to information, such bodies could but may not necessarily be mandated to receive challenges or appeals in the sense of article 8. Depending on national law, this function may be attributed to the offices of ombudspersons, public prosecutors, the comptroller or auditor general, institutes and councils for official access to information and transparency or information commissioners, for example. Whether these bodies satisfy the requirements of the access to justice pillar shall depend on their nature and

specific functions. The decisions of those bodies may be subject to further administrative and judicial challenge and appeal procedures, so their use may not exhaust all available review options.

A second group of decisions, actions or omissions that may be legally reviewed are those related to public participation in the decision-making process. While article 7 does not explicitly mention the right to be informed of the possibility to challenge and appeal issues related to public participation procedures, it may be inferred from articles 7.6 and 7.7 as being part of an appropriate participation process. In addition, it may be considered an essential component of the decision made by the public authority under article 7.8, in line with administrative law principles (the right to judicial review of administrative decisions). Finally, article 7.9 refers to the core content of the right to access to justice by stating that "the information disseminated shall include the established procedure to allow the public to take the relevant administrative and judicial actions".

Third, challenges and appeals may be possible when a decision, action or omission affects or could affect the environment adversely or violate laws and regulations related to the environment. This possibility is directly linked to the right to live in a healthy environment recognized in the objective and the general provisions of the Agreement. Among others, this provision aims to enhance the rights-holder's ability to seek environmental law enforcement and request the response to environmental harm, bringing attention to violations so that authorities may mobilize to act.

8.3 To guarantee the right of access to justice in environmental matters, each Party shall have, considering its circumstances:

The third paragraph of article 8 contains a set of elements, means, or instruments necessary to guarantee the right to access justice in environmental matters. These components vary in nature, and include institutional, procedural or technical and legal elements. They shall all be implemented considering the circumstances of each party. This clause shall be fundamental in determining, for example, the type of access to expertise required by competent State entities, the measures to facilitate the production of evidence or the mechanisms for redress to be used.

8.3(a) competent State entities with access to expertise in environmental matters;

The Agreement does not opt for a specific model of competent State entity, leaving it up to each party to decide on the best approach to be used considering its context, circumstances, culture and legal system. Competent State entities cover both judicial and administrative entities, as well as bodies of any other nature with jurisdiction over the matters covered by the Agreement, as applicable.

These State entities do not have to be specifically or exclusively environmental, but they must have the competency to review and adjudicate on environmental matters. The entities may be judicial or non-judicial, as the Agreement makes no distinction between the two types. For example, the Agreement does not outline specific differences in the judicial field between the possible jurisdictions, such as criminal, civil, commercial or otherwise. The only requirement the Agreement establishes is that these entities, whichever form they take, must have access to expertise in environmental matters.

Environmental cases are often complex and involve highly technical issues, including the need to understand scientific and specialized data on engineering, physics, chemistry, biology and other environment- and natural resource-related issues. As a result, access to knowledge and understanding on these matters by administrators of justice is fundamental to ensure that competent State entities are able to exercise their functions adequately and in an informed manner. The reference to expertise is dynamic in the

sense that it should be assessed as per the technologies and scientific and technical developments that are available in a given context at the time of adjudication.

This expertise may be obtained through different means, for example court or judicial experts and advisors, specialized judges or specific chambers, environmental science technical training, the possibility of intervention by third parties (e.g. *amici curiae* or friends of the court), or even the establishment of specific environmental courts.

Although the Agreement does not require the establishment of environmental courts or tribunals,[64] these specialized entities, when properly structured and resourced, have proven to be an effective means of ensuring access to justice in environmental matters. Specialized courts and tribunals are a way to ensure that the necessary skills and knowledge to decide environmental cases are provided. They also allow for swift, streamlined and effective handling of environmental cases.

Depending on the model, such bodies may be judicial or non-judicial, national or subnational and may operate within ordinary or superior instances. Scientists or technical experts may sometimes be called upon to become members of these specialized courts and tribunals. On other occasions, specialized judges are educated and trained or some justices are formally designated to act as specialized environmental judges.

For non-judicial specialized entities, environment-specific administrative instances permit technical review before appeal to the judiciary. They may operate within the same competent government ministry, a different ministry or agency, or intra-agency, that is, under the agency that issued the decision, but retaining significant autonomy and decisional independence. Other non-judicial forms include oversight bodies, ombudspersons' offices or human rights commissions with specific departments dedicated to environmental issues.

8.3(b) effective, timely, public, transparent and impartial procedures that are not prohibitively expensive;

Due process requires legal procedures to be clearly established in advance, fair and understandable to all parties and to respond to certain standards both in law and in practice.

Under the Agreement, procedures shall meet five requirements: they shall be effective, timely, public, transparent and impartial. To be effective, procedures require the actual output or result to equate to the intended expectations and desired objective, both specifically and over time. The availability of remedies is an essential aspect of effectiveness. Effectiveness also extends to the implementation of the decision reached. Timeliness includes reasonable time frames from the commencement of a procedure through to its completion. Cases should be dealt with expeditiously, avoiding backlogs and ensuring timely, adequate responses. Procedures should be public and transparent, allowing the public to obtain information on the procedure itself and on the status of a specific process. Procedures should also be clear and understandable. Rulings should be published and be publicly accessible. Impartiality means that procedures should be based on objective criteria and free from biases, favouritism, prejudices or unjustified preferences, and is intrinsically linked to fairness, equality and non-discrimination.

In addition, considering that cost is one of the main barriers to access to justice, the Escazú Agreement mandates that procedures must not be prohibitively expensive. This is an undefined concept that requires an in-depth analysis under each national and specific circumstance. Usually, the costs of any review procedure include administrative or judicial filing fees, bonds and security costs, lawyers' and experts' fees, costs of gathering evidence and possibly a defendant's legal costs if the claim is unsuccessful (what is

[64] Generally speaking, in legal English, courts operate under the judiciary and tribunals within the administrative branch. However, these terms are often used interchangeably.

known as “undertaking for damages”). In environmental cases, these costs may be even higher and more burdensome given their complexity and the need for specialized technical assistance.

To determine what is prohibitively expensive, parties shall weigh both subjective and objective elements. On the one hand, costs should not exceed the resources of the claimant in an unreasonable way. This depends on the particular circumstances and conditions of the person or group of persons, such as persons and groups in vulnerable situations. On the other hand, the costs should not be objectively unreasonable for the general public so as to deter them from seeking justice or amounting to such a level that they compromise the right in any way. A key term in this regard is the human rights criterion of “affordability”, which is accessibility at a cost that is bearable. This does not necessarily mean that procedures should be free of cost, but that any costs must be reasonable and must not limit the capacity to seek justice.

In assessing whether costs are unreasonable in an individual case, some of the facts that may be examined include the merits (for example, the reasonability of the prospect of success), the importance to the claimant, the significance of the case to environmental protection and the complexity of the issue at hand.

There are different ways to avoid unreasonableness. These include appropriate assistance mechanisms for persons and groups in vulnerable situations, such as those referred to in paragraph 5 of article 8, or the fostering of alternative dispute resolution mechanisms mentioned in paragraph 7 of the same article. Other means include waivers and cost-recovery mechanisms; the establishment of support funds; financial assistance for scientific and technical assistance; elimination of the need for legal representation; or the reduction or suppression of administrative or legal fees. The rule that “costs follow the event” may also be limited, through caps or scales, to ensure they are not prohibitive. The removal of cost security in cases of injunctions may likewise reduce financial barriers.

8.3(c) broad active legal standing in defence of the environment, in accordance with domestic legislation;

Legal standing (*locus standi*) refers to the right of a person (whether natural or legal) to initiate a proceeding and formally become a party thereto. As one of the core elements of ensuring access to justice, the scope of legal standing in environmental matters is of utmost importance. Given the particularities of environmental cases, which involve collective, diffuse and overriding interests, excessively narrow interpretations of this standing may directly or indirectly constitute a barrier to seek justice and to the full realization of rights. Thus, this provision requires active legal standing in defence of the environment to be “broad” in accordance with domestic legislation.

The Escazú Agreement does not establish any specific description of broad active standing, leaving it for each party to define in its domestic legislation. As a result, nothing prevents a party from providing the widest possible standing (i.e. any person in general without any specific requirement). This standing may also be less broad, establishing some conditions or requirements, such as the exercise of an action through specific bodies, conditions or formats. The Agreement does not indicate either under which jurisdiction or area of law such broad active legal standing shall be granted, thereby allowing it to be recognized in all or some areas of law (constitutional, civil, criminal, administrative or other). However, legal standing must be congruent with the rights-holder recognized, to ensure the effectiveness and realization of the right. Furthermore, it should be expressly and clearly defined, and its requirements should be publicly known.

Some of the ways in which parties may meet this obligation are by granting standing to a State body, public prosecutors, ombudspersons, organizations, groups or associations in representation of an individual or community, or even to any person. Class action lawsuits and *actio popularis* would also fall under the definition of “broad” standing. The nature of this broad standing shall be determined by domestic legislation

and national application of the same. However, broad standing has sometimes been granted through judicial interpretation of procedural rules, for example in many common law jurisdictions.

In the international framework, pursuant to article 2.3 of the International Covenant on Civil and Political Rights, any person whose rights or freedoms recognized therein are violated shall have access to an effective remedy. The United Nations Human Rights Committee has established that access to justice shall be ensured effectively, so that no person is deprived of their right to seek justice.[65] In that regard, the right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or any other condition, who may find themselves in the territory or subject to the jurisdiction of the State. Article 25 of the American Convention on Human Rights also recognizes the right to judicial protection.

This guarantee likewise prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. The guarantee is violated if certain persons are barred from bringing suit against any other persons, for example by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In this sense, all parties in a process shall have the same procedural rights.

8.3(d) the possibility of ordering precautionary and interim measures, inter alia, to prevent, halt, mitigate or rehabilitate damage to the environment;

Precautionary and interim measures are among the measures that a judicial or administrative body may take before concluding the process to preserve the object, substance or effectiveness of the same while the proceedings take place. They are intended to avoid the frustration of the final result by acts, facts or the situation on the ground.

In cases where environmental damage is being caused or is likely to be caused, such measures are all the more critical given the impact and frequent seriousness and irreversibility of the damage. When there is serious danger of destruction of the *status quo ante*, prior or additional damage may still occur and the violation persists, or where previous damage may be reversed, minimized or mitigated, review bodies may order precautionary and interim measures. These measures are often called "injunctions" or "interdicts" and the remedy sought is normally referred to "injunctive relief". This injunctive relief may be only interim or temporary or may be confirmed as permanent or final in the decision of the review body.

Before ordering any measures, review bodies may need to follow the "*fumus boni iuris*" and "*periculum in mora*" principles. A proper right should exist *prima facie* or, at least, there should be an assumption that such a right claimed exists in practice. Furthermore, there must be an actual risk of imminent and irreparable harm to the interests of the claimant which may only be avoided or safeguarded by means of the measure taken. Swift and effective interim measures are thus fundamental to fulfil their aim and prevent avoidable harm or avoid an aggravation of the same.

The Escazú Agreement does not oblige parties to order, automatically or ipso facto, precautionary or interim measures, but rather to foresee their possibility. The issuance of such measures as well as their scope and effects are guided exclusively by national law. As such, the decision to order them rests completely with the review body, being contingent upon the applicable national legal framework and the situation and circumstances of the case at hand.

[65] See Human Rights Committee, "General Comment No. 32: article 14 (Right to equality before courts and tribunals and to a fair trial)" (CCPR/C/GC/32), Geneva, 2007.

The article indicates that the measures are intended, among other things, to prevent, halt, mitigate or rehabilitate damage to the environment. Therefore, without prejudging the merits of the case, an interim injunction may therefore temporarily limit an activity or require a person or entity to undertake some action or refrain from doing something temporarily.

8.3(e) measures to facilitate the production of evidence of environmental damage, when appropriate and as applicable, such as the reversal of the burden of proof and the dynamic burden of proof;

Sound, credible and accessible evidence of environmental damage is fundamental to adjudicate on environmental cases. In addition to allowing verification of the scope and extent of the harm, it is decisive in determining the causal link between the action or omission and the damage caused and defining adequate redress and remedy measures. As environmental damage affects a collective good (the environment), it causes not only an individual prejudice but also one that negatively affects a community as a whole. Furthermore, the high specialization and scientific and technical knowledge required to produce, gather, analyse and assess such evidence may represent a significant barrier to access justice.

Environmental harm is often irreversible, diffuse both in its determination and in its manifestation, cumulative and consecutive. It may also have permanent implications affecting a community as a whole that may be undetermined and undeterminable. As a result, applying the traditional approach of civil or tort law strictly to the environmental field may not be sufficient. The overriding interest of the environment and the underlying preventive logic of environmental law and policy must be considered.

Against this backdrop, the main obligation in paragraph 3(e) of article 8 is to have measures to facilitate the production of evidence of environmental damage. However, this obligation is not absolute, as the article establishes certain conditions. The measures are to be available: (1) when appropriate and as applicable and (2) considering the circumstances of each party, as indicated in the first line of article 8.3.

Each party and competent body is free to determine which measures are used, as appropriate and applicable, considering its circumstances, and provided they facilitate the production of evidence. Although the article expressly mentions the reversal of the burden of proof and the dynamic burden of proof (see box V.1), the connector “such as” clearly indicates these are possibilities but not the only ways to facilitate the production of this evidence. In some jurisdictions, these concepts may already be legally or jurisprudentially recognized and widely applied. In other countries, however, this may not be the case and other measures may be used. The Agreement may nonetheless inspire States to employ these concepts in the future.

Other means not expressly indicated in the Agreement but which may be acceptable to fulfil this obligation include giving a specific weight or preference to the opinions of experts and scientific means, judicial visits to the places where the damage was caused or suffered, establishing a rebuttable presumption of decisions of oversight bodies, *amicus curiae*, strict liability (which includes but also goes beyond the mere facilitation of the production of evidence) or any other means admitted in law that confirms the authenticity and scope of environmental damage.

The underlying logic of these measures is to correct asymmetries and protect the weakest party in an environmental damage process, eliminating barriers to ensure the full exercise of the right of access to justice and to reparation. Furthermore, they result in greater agility and efficiency of environmental justice, since they generally allow access to evidence and expert opinions at a lower cost and reduce the delays related to producing this evidence. At the same time, more equitable processes are promoted and the risk of environmental impunity is reduced in favour of a legal asset of vital importance for society as a whole.

Box V.1

The reversal of the burden of proof and the dynamic burden of proof as non-exhaustive examples of measures that facilitate the production of evidence of environmental harm

As indicated above, the reversal of the burden of proof and the dynamic burden of proof are mentioned as possible ways through which parties may discharge the obligation under article 8.3(e).

Both concepts modify the usual rule in common procedures imposing on the party alleging the offence the burden of proving the facts being alleged. Whereas the reversal of the burden of proof shifts the obligation of proving the existence or non-existence of environmental harm from the plaintiff to the defendant, the dynamic burden of proof places the onus on the party that is in a better position to prove or disprove it, given their special situation, knowledge or capacity in the case in question.

The reasoning behind these concepts in a broader environmental law context responds to the singularities and complexities of environmental cases. Given the difficulty of proving what is alleged, and considering the overriding public interest in the defence of the environment, by transferring this burden from the alleged victim of damage to the defendant or alleged offender, the balance between the parties to a process is restored.

Both the reversal of the burden of proof and the dynamic burden of proof are based on the procedural principle of good faith and procedural collaboration. Moreover, they do not alter the right to defence in accordance with due process. That is, evidence to the contrary is admitted and may be rebutted by those bearing the burden of proof, who may demonstrate the non-causality of the damage or their non-participation in it, or attribute this damage to force majeure, the fault of the victim or the act of a third party. The obligation imposed on the party is to disprove what is alleged by the other precisely because it is presumed that he or she is in a better position to do so.

Even if the reversal of the burden of proof or the dynamic burden of proof are provided for in domestic law, their application shall not necessarily be automatic and shall only be determined by the administrative or judicial body on a case-by-case basis, in accordance with the requirements and procedures set forth in national legislation. Furthermore, they may not necessarily apply to all environmental damage, but may be limited to some specific cases of increased danger. For example, some countries only contemplate these measures for actions or omissions in relation to certain toxic or dangerous materials, or activities considered high-risk.

Another key consideration is that this shifting of the burden of proof does not affect the legal guarantee of the presumption of innocence. While the presumption of innocence refers to legal liability (generally of criminal nature, resulting from crimes, misdemeanours and other criminal offences) and preserving the innocence of the accused until proven guilty beyond a reasonable doubt, the shifting of the burden of proof of environmental damage only relates to the existence or non-existence of damage and does not refer to liability, strictly speaking. It is an evidential burden, that is the burden of adducing evidence that suggests a reasonable possibility that damage exists or not.

Even within the realm of criminal law, some jurisdictions admit the reversal of the burden of proof for criminal liability provided that it is justified, not unreasonable in the circumstances and maintains the rights of the accused. This reversal may be justified if the nature of the offence makes it very difficult for the prosecution to prove each element, or if it is clearly more reasonable and practicable for the accused to prove a fact than for the prosecution to disprove it. A legal burden may only be imposed if the law expressly allows, or requires the defendant to prove the matter, or creates a presumption that the matter exists unless the contrary is proved.

In addition to environmental law, the onus of proof may be shifted in other fields of law without compromising the presumption of innocence. This is the case of tax law (presumptions of tax bases), labour law (presumption of the existence of a contractual relationship in favour of the worker), medical law (civil liability for medical malpractice), insurance law (presumption of civil liability of a driver for damages to people and property), consumer law (presumption of responsibility for damages of a service provider caused to consumers and users) or family law (presumption of paternity). In all these areas, regardless of their name, legal presumptions are established that reverse the burden of proof, and do not prevent the defendant or other party from disproving what is being alleged against him or her.

Source: Economic Commission for Latin America and the Caribbean (ECLAC).

8.3(f) mechanisms to execute and enforce judicial and administrative decisions in a timely manner; and

Mechanisms for the execution and enforcement of administrative and judicial decisions are a key component of the rule of law. These mechanisms should enable timely and effective enforcement to remedy any harm or violation of rights, provide compensation when applicable and prevent harm from occurring in the future. Flawed and late enforcement may constitute a breach of the right to access justice and also undermine the legitimacy of the system. Some decisions may be self-enforcing, such as certain types of judgments. However, other decisions may require additional actions, either through specific processes or oversight and supervision procedures. The need to adopt additional measures must be assessed in accordance with the domestic law of each State party on a case-by-case basis.

The reference to decisions should be understood broadly as both final and provisional or interim decisions. That is, the execution and enforcement mechanisms also refer to injunctive relief and precautionary measures that aim to avoid the realization of harm or the occurrence of a violation.

Examples of mechanisms include the writ of continuing mandamus, the powers to summon and hold a person in contempt, the imposition of fines on the person or body responsible for non-implementation or to the use of force to ensure judgements are executed. The mechanisms for execution and enforcement must be linked to the decision made and the remedy provided. For example, property seizures, asset freezes or bans on movement could be appropriate enforcement powers in some circumstances to enforce a ruling and to provide effective remedy. Some of the decisions may encourage compliance by alleviating the burden imposed on the unsuccessful party. For example, fines may be reduced or exempted based on good behaviour of the defendant. At times, execution and enforcement may fall under the mandate of bodies different from those that adjudicated on the case, making effective coordination and collaboration between institutions even more essential.

8.3(g) mechanisms for redress, where applicable, such as restitution to the condition prior to the damage, restoration, compensation or payment of a financial penalty, satisfaction, guarantees of non-repetition, assistance for affected persons and financial instruments to support redress.

Redress and remedy are the essence of access to justice. The aim of any administrative or judicial review mechanism is to ensure flawed or erroneous decisions, actions or omissions are corrected and, if applicable, to obtain a remedy.

In article 8.3(g), the agreement mentions examples of redress mechanisms that could be adopted, individually or in combination with others, depending on the case. For example, restitution may be complemented with guarantees of non-repetition and the assistance of affected persons. Although no specific hierarchy or order of preference is included in the treaty, the tendency in jurisdictions is to give preference to restoration over compensation and, where neither of these are possible, to seek other means such as satisfaction. Given the irreversible impacts of environmental damage in many cases, provisional measures such as interim injunctive relief may be important remedies to avoid this damage from occurring or to prevent the aggravation of the same. Other mechanisms for redress not mentioned in this article would also be acceptable, such as restitution (i.e. remedy through which a defendant may be ordered to give up gains from an unlawful activity to the claimant), mandatory directions or quashing of orders.

“Restoration” refers to a return to the situation prior to the occurrence of harm or grievance. This would mean returning ecosystem conditions to the *status quo ante*, re-establishing the situation that existed before provided that it is not materially impossible and does not involve a burden completely disproportionate to the benefit that would be derived from restoration as compared to compensation. When damage is irreversible, mitigation measures may be required as part of restoration. These would include, for example,

an order to create natural areas similar to those that were damaged irreversibly either in the same place or a similar location. “Compensation” means the order to compensate the claimant for the loss through monetary or financial means. The methodology followed for the economic valuation of environmental losses shall be fundamental in that regard. Insofar as “restoration” and “compensation” are not possible, adjudicators may order “satisfaction”, which may consist of an acknowledgement of the breach or violation, an expression of regret, a formal apology or any other appropriate modality.

Special mention should be made of financial instruments to support redress. These funds may be established for a specific or general purpose, on an ad hoc or structural basis. These financial instruments may be used to restore or compensate environmental harm, to prevent future harm, to provide assistance to groups and communities or to undertake education and awareness-raising activities. The resources for these funds may come from the fines and penalties obtained by public authorities.

8.4. To facilitate access to justice in environmental matters for the public, each Party shall establish:
(a) measures to minimize or eliminate barriers to the exercise of the right of access to justice;
(b) means to publicize the right of access to justice and the procedures to ensure its effectiveness;
(c) mechanisms to systematize and disseminate judicial and administrative decisions, as appropriate; and
(d) the use of interpretation or translation of languages other than the official languages when necessary for the exercise of that right.

Article 8.4 refers to measures, means and mechanisms to facilitate access to justice for the public. Unlike the measures included in article 8.5, which applies to persons and groups in vulnerable situations, this paragraph is intended for the public at large.

Article 8.4(a) includes the general obligation of establishing measures to minimize or eliminate barriers to the exercise of the right of access to justice. Some of these measures are already referred to in other parts of this article, such as the obligation to ensure that procedures are not prohibitively expensive, broad active legal standing in defence of the environment and measures to facilitate the production of evidence of environmental damage. This provision may therefore relate to these or additional measures to overcome any of the barriers. Barriers are generally technical, financial or legal. They may also be related to unclear rules or procedures and weak enforcement of judgements and decisions. In addition, they may involve a lack of knowledge of rights and applicable laws and capacities. As a result, this provision must be read in conjunction with the other provisions that aim to minimize or eliminate barriers and the capacity-building and cooperation pillar.

Article 8.4(b) is related to information and awareness-raising about the existence of the right to access justice and the procedures to ensure its effectiveness. This provision is premised on the fact that to fully realize their rights, rights-holders must be knowledgeable about them and about the means and procedures to render them effective. This letter builds on the general provision included under article 4.4 relating to the provision of information to facilitate the acquisition of knowledge of access rights, and must be read in conjunction with other provisions, such as article 7.9. Public information campaigns, general information pages or other means may contribute to sensitizing the public to their right to access justice. Furthermore, good administration entails that any decision made by a competent authority should also indicate to the interested party the right to challenge or appeal that decision, the body to which they submit the challenge or appeal, the time frames, requirements and procedures to do so, and any other related information that may be necessary.

The mechanisms to systematize and disseminate judicial and administrative decisions also build capacities and knowledge of the public on access to justice. Article 8.4(c) indicates that these shall be established “as appropriate”, leaving it to each party to determine. Judicial and administrative decisions on environmental

matters are considered environmental information, and unless subject fully or in part to any legal regime of exceptions, shall be made public and be accessible in accordance with the standard provided for under article 5. These decisions may also be included in the environmental information systems indicated in article 6.3. Some good practices include online and searchable databases, judicial and administrative observatories or repositories of rulings and decisions.

The provision includes the obligation of interpretation or translation of languages other than the official languages when necessary for the exercise of the right to access justice. As language issues may become a barrier to access justice, this provision intends to ensure due process, judicial equality and fairness throughout the review procedures. Article 8.4(d) only states "use of" but omits who or which entity should provide the interpretation or translation services, leaving it for each party to determine. Nonetheless, this paragraph reinforces the measures that could be taken under article 10.2(e), specifically for persons or groups in vulnerable situations.

While the terms translation and interpretation are sometimes used interchangeably, interpretation relates to the oral translation of spoken language, whereas translation relates to that of the written word. The recourse to interpretation is of great relevance in the context of judicial and administrative hearings.

8.5. In order to give effect to the right of access to justice, each Party shall meet the needs of persons or groups in vulnerable situations by establishing support mechanisms, including, as appropriate, free technical and legal assistance.

Paragraph 5 of article 8 mandates each party to take specific measures to support persons or groups in vulnerable situations in accessing justice. The obligation provided for is to establish support mechanisms that allow their needs to be met. This provision is limited to persons or groups in vulnerable situations, as defined under article 2, and does not apply to the public in general.

Support mechanisms may include, as appropriate, free technical and legal assistance. Although each party shall ensure such mechanisms are available, they may be provided by various actors, including ombudspersons, public prosecutors and defenders, civil society, and pro bono and public interest clinics. Furthermore, the agreement does not require these mechanisms to be specifically environmental, but to allow environmental justice to be sought.

The provision reinforces article 4.5, requiring each party to ensure guidance and assistance particularly to those persons or groups in vulnerable situations to facilitate the exercise of their rights. It also complements article 9 on human rights defenders in environmental matters.

8.6. Each Party shall ensure that the judicial and administrative decisions adopted in environmental matters and their legal grounds are set out in writing.

The Agreement requires all decisions and their legal grounds to be set out in writing. This includes interim and final decisions. From a general perspective, setting out any judicial and administrative decision adopted in writing is an essential component of the principle of legal certainty. Having such decisions in writing not only benefits due process but also facilitates record-keeping, public accessibility and dissemination, and any further challenge and appeal procedures that may be available against the decision in question.

Such decisions may be included in specific online repositories or databases and may also be a part of the environmental information systems referred to in article 6.3.

8.7. Each Party shall promote, where appropriate, alternative dispute resolution mechanisms in environmental matters, such as mediation, conciliation or other means that allow such disputes to be prevented or resolved.

Article 8.7 establishes the obligation to promote alternative dispute resolution mechanisms in environmental matters where appropriate. Alternative dispute resolution may be defined as any means of resolving a dispute outside the judicial or administrative process. These mechanisms have gained greater relevance as they provide flexible, adaptable and effective means of settling disputes at a lower cost and in a shorter time frame. Sometimes, they may be perceived by the public and other stakeholders as more accessible. However, alternative dispute resolution mechanisms are without prejudice to the rights and guarantees established in the remainder of the article on access to justice in environmental matters.

The Agreement does not require these mechanisms to be specifically environmental, but to be applicable to environmental matters. The connector “where appropriate” also leaves flexibility to parties to determine when and what alternative dispute resolution mechanisms are made available.

Several possible types of alternative dispute mechanism are admissible under the Agreement. The article refers specifically to mediation and conciliation. A third party intervenes in both mechanisms but to a different degree in each one. In mediation, a third-party mediator helps the parties involved in a dispute to reach agreement by common consent. The mediator may, privately or collectively, help the parties to identify the issues in dispute and present proposals to resolve them. However, the mediator may not make decisions. Conciliation is similar to mediation but instead of making proposals, the third party’s role is focused on creating an enabling environment for dialogue to find common ground. A conciliator may also have expertise in the matter and may also be empowered to make findings of fact.

In some countries, conciliation and mediation are considered mandatory prior to beginning a judicial or administrative process, allowing an opportunity for the parties to settle a dispute beforehand. In other cases, during formal dispute settlement procedures, parties are allowed to seek and reach a solution amicably, which would then put an end to the formal procedure.

In addition to mediation and conciliation, the provision also admits other means of alternative dispute resolution, such as enquiry or arbitration. Depending on the case, procedures before ombudspersons may also fall under the category of alternative dispute resolution mechanisms.

VI. Human rights defenders in environmental matters

Protecting the environment requires, first and foremost, protecting those who defend it. Article 9 of the Escazú Agreement is innovative in its inclusion of specific provisions to protect and promote the work of human rights defenders in environmental matters in Latin America and the Caribbean.

Human rights defenders in environmental matters are among the groups most at risk of suffering human rights violations. In its historic resolution 40/11 of 2019, the United Nations Human Rights Council expressed great concern about the situation of these human rights defenders around the world, and strongly condemned the murders and all other human rights violations committed against them, highlighting that those acts may violate international law and undermine sustainable development at the local, national, regional and international levels.[66] The dramatic situation faced by human rights defenders in environmental matters was also recognized by the then United Nations Special Rapporteur on the situation of human rights defenders, Michel Forst, in his 2016 report,[67] in which Latin America was deemed one of the most hostile regions for environmental defenders.

The special consideration given to human rights defenders in environmental matters by the Escazú Agreement does not entail the establishment of new rights or special jurisdictions for this group, nor does it recognize any additional rights other than those that every person already has under international human rights law. Rather, the Escazú Agreement reiterates and reaffirms commitments already assumed by States under international, regional and national frameworks and adapts them to the environmental sphere, facilitating their application to the work and practical situation of environmental defenders in view of the particular risks and threats they face in the region.[68]

Every person, on an equal and non-discriminatory basis, has the right to defend human rights.[69] Human rights defenders in environmental matters have the same rights and obligations as every other person and shall act peacefully. However, in view of the certain or likely risks to which they are exposed in the environmental field, it is necessary to consider specific measures for individuals and groups within this group. The establishment of affirmative measures for specific groups is part of international human rights law. Human rights instruments seek to protect particularly those who are more vulnerable to human rights violations and therefore establish specific obligations and guarantees to protect people and groups in situations of greater vulnerability.

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66 See See Human Rights Council, "Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development" (A/HRC/RES/40/11), New York, 2019. Operative paragraph 3 of the resolution "urges all States to take all measures necessary to ensure the rights, protection and safety of all persons, including environmental human rights defenders, who exercise, inter alia, the rights to freedom of opinion, expression, peaceful assembly and association, online and offline, which are essential for the promotion and protection of human rights and the protection and conservation of the environment".

67 See United Nations, *Situation of human rights defenders: note by the Secretary-General* (A/71/281), New York, 2016.

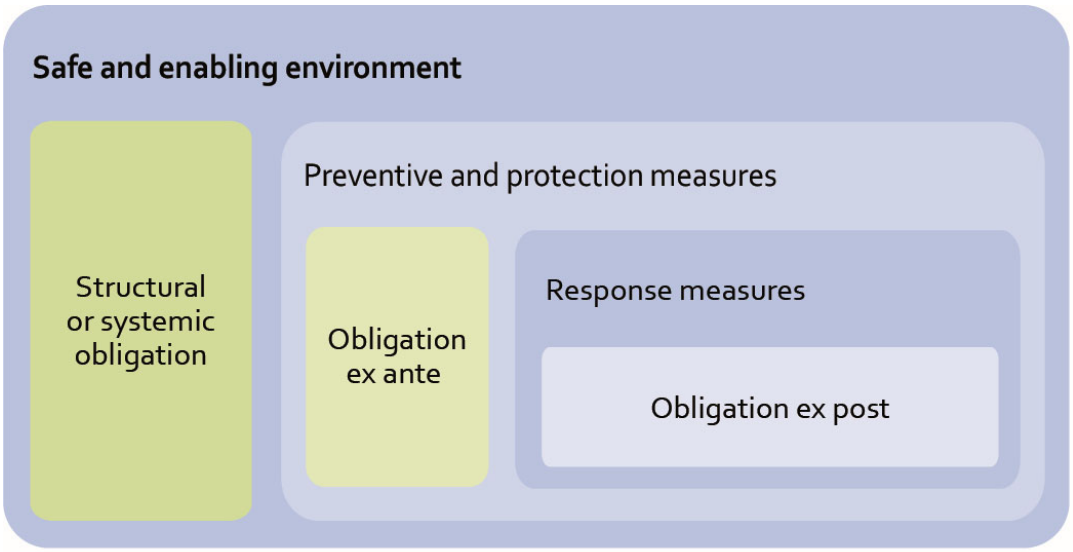
68 See Human Rights Council, "Final warning: death threats and killings of human rights defenders. Report of the Special Rapporteur on the situation of human rights defenders, Mary Lawlor" (A/HRC/46/35), New York, 2020.

69 See United Nations, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (A/RES/53/144), New York, 1999, article 1.

The Escazú Agreement thus intends to highlight the role and work of human rights defenders in environmental matters and to require States to safeguard their rights and avoid violations. It also seeks to reinforce capacity-building and regional cooperation on the issue, in line with national and international commitments.

Article 9 may be structured around three main clusters of structural, preventive and responsive obligations, as indicated in diagram VI.1.

Diagram VI.1
Structure of article 9 of the Escazú Agreement



Source: Economic Commission for Latin America and the Caribbean (ECLAC).

Table VI.1 below provides an overview of the main obligations contained in article 9 and practical guidance for its implementation.

Table VI.1
Main obligations contained in article 9 of the Escazú Agreement and implementation guidance

Provision	Obligation	Implementation guidance
Paragraph 1	Guarantee a safe and enabling environment for human rights defenders in environmental matters	- Obligation of a general, structural or systemic nature - A conducive environment for the enjoyment of rights, freely and without discrimination, threats, restrictions or insecurity
Paragraph 2	Take measures to recognize, protect and promote all the rights of human rights defenders in environmental matters	- Measures shall be adequate and effective - Specific mention is made of certain rights (life, personal integrity, freedom of opinion and expression, peaceful assembly and association and free movement) and of the ability to exercise access rights - Parties shall take into account international human rights obligations, constitutional principles and basic concepts of their legal systems
Paragraph 3	Take measures to prevent, investigate and punish attacks, threats or intimidations against human right defenders in environmental matters	- Measures shall be appropriate, effective and timely - Preventive and responsive dimensions

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of the Escazú Agreement.

A. Article 9 – Human rights defenders in environmental matters

> 9.1. Each Party shall guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity.

Paragraph 1 of article 9 refers to the obligation to guarantee a safe and enabling environment for human rights defenders in environmental matters. It may be considered an obligation of a general, structural or systemic nature.

In keeping with international human rights law, States not only have the duty to respect and protect the human rights of every person under their jurisdiction, but also to render these rights effective. In order to do so, duty bearers are obliged to take all necessary measures to create all conditions necessary in the social, economic, political and other fields, and to ensure the legal guarantees that may be required to enjoy fundamental rights and freedoms in practice.

In this context, the well-recognized concept of a "safe and enabling environment" in international human rights law is especially important. The term refers to the general, structural or systemic characteristics in a given context that provide for the full realization of rights. This environment enables the enjoyment of rights, freely and without discrimination, threats, restrictions or insecurity.

The scope of the obligation to ensure a safe and enabling environment for human rights defenders has been determined in countless reports of United Nations Special Rapporteurs and of the Office of the United Nations High Commissioner for Human Rights (OHCHR).

In her report of 2013, the former Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, examined in detail the main elements necessary for human rights defenders to act in a safe and enabling environment.[70] These include:

1. A conducive legal, institutional and administrative framework.
2. The fight against impunity and access to justice for violations against defenders.
3. Strong, independent and effective national human rights institutions.
4. Effective protection policies and mechanisms, including public support for the work of defenders.
5. Special attention to risks and challenges faced by women defenders and those working on women's rights and gender issues.
6. Non-State actors' respect for and support of the work of defenders.
7. Safe and open access to the United Nations and international human rights bodies.
8. A strong, dynamic and diverse community of human rights defenders.

The former Special Rapporteur on the situation of human rights defenders, Michel Forst, adapted these aspects to the environmental domain in his report of 2016 on environmental defenders.[71] According to the report, a safe and enabling environment is fostered through: (a) meaningful participation, transparency, and accountability; (b) the fight against impunity and access to justice; (c) legal frameworks; (d) human rights due diligence; (e) human rights education; and (f) human rights awards.

The foregoing was likewise reaffirmed by the Special Rapporteurs on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox and David R. Boyd, in their 2018 report. According to the report, States must establish a safe and conducive environment for defenders to act without threats, harassment, intimidation or violence. This environment requires States to pass and enforce laws that protect human rights defenders in accordance with international human rights standards; publicly acknowledge the contributions of human rights defenders to society and ensure that their work is not criminalized or stigmatized; establish, in consultation with human rights defenders, effective protection and early warning programmes; provide adequate training for security officers and law enforcement officials; guarantee prompt and impartial investigations of threats and violations and the prosecution of the alleged perpetrators; and establish effective remedies for violations, including appropriate compensation.[72]

Referring to the expansion of civic and democratic spaces, the Office of the United Nations High Commissioner for Human Rights[73] has identified five essential elements to create and maintain this environment: (a) a solid legal framework in line with international standards and a strong national system for the protection of human rights that protects public freedoms and effective access to justice; (b) a

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[70] See Human Rights Council, "Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya" (A/HRC/25/55), New York, 2013.

[71] See United Nations, *Situation of human rights defenders: note by the Secretary-General* (A/71/281), New York, 2016.

[72] See United Nations, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: note by the Secretary-General* (A/73/188), New York, 2018. The report refers to principle 4 of the framework principles on human rights and the environment (A/HRC/37/59), which indicates that "States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence".

[73] See Human Rights Council, "Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned: report of the United Nations High Commissioner for Human Rights" (A/HRC/32/20), New York, 2016.

conducive political environment for the work of civil society; (c) access to information; (d) channels for civil society participation in policymaking and decision-making processes; and (e) long-term support and resources for civil society.

In light of the above, the full and effective implementation of the provisions of the Escazú Agreement as a whole would contribute significantly to the creation and maintenance of a safe and enabling environment for human rights defenders in environmental matters.

The Agreement does not define the term "human rights defenders in environmental matters" on the understanding that the concept "human rights defenders" is sufficiently well established in international human rights law (see box VI.1). As a result, the Agreement merely places this concept within an environmental context. Paragraph 1 of article 9 refers broadly to persons, groups and organizations that promote and defend human rights in environmental matters. Human rights defenders in environmental matters are mainly defined by what they do. Thus, they include any person or group that advocates for the environment, either regularly and systematically or temporarily and sporadically, in a personal or professional capacity, through organizations or formal and structured groups, informal structures or individually. They are all those who promote and defend the right to a healthy environment and other human rights relating to environmental matters, and do not require legal or formal recognition or self-identification.

Box VI.1
Who are human rights defenders?

There is no specific definition of who is or can be a human rights defender. The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the Declaration on Human Rights Defenders, refers to "individuals, groups and associations […] contributing to […] the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals" (fourth preambular paragraph). This reference must be read in conjunction with article 1 of the Declaration stating that "everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels".

Therefore, human rights defenders may be any person or group of persons working to promote and protect human rights, ranging from organizations and institutions to individuals working within their local communities. Defenders may be of any gender, age and professional or other background. They may also be government officials. There is no special or formal requirement to qualify as a human rights defender.

Is a minimum standard required of human rights defenders?

Anyone may become a human rights defender. International human rights law does not call for any qualification or specific requirement. Nonetheless, the Declaration on Human Rights Defenders clearly indicates that defenders have both rights and responsibilities. In terms of the latter, human rights defenders must accept the universality of human rights and act peacefully.

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of United Nations, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (A/RES/53/144), New York, 1999.

Paragraph 1 of article 9 should be read in conjunction with paragraphs 2 and 6 of article 4, which call for the free exercise of the rights contained in the Agreement and reinforce the obligation to guarantee an enabling environment for the work of persons, associations, organizations or groups that promote environmental protection.

9.2. Each Party shall take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights, taking into account its international obligations in the field of human rights, its constitutional principles and the basic concepts of its legal system.

The second paragraph of article 9 calls on States to take measures to recognize, protect and promote the rights of human rights defenders in environmental matters. Several elements are worth noting. First, there is an obligation to take measures that are "adequate and effective", meaning they must be appropriate and fit for purpose in each particular situation and the context of each party. Second, the verbs "recognize", "protect" and "promote" outline three dimensions relating to the rights of human rights defenders in environmental matters. States commit to recognizing all the rights of human rights defenders in their national frameworks, including in law and in practice. States shall also protect individuals and groups against human rights abuses by third parties. Lastly, there is an obligation to promote these rights, which requires proactive action by the State. The duty to respect human rights is implied in the mandate to recognize and protect them.

The obligation to protect has both a positive scope and a negative scope. As the United Nations Human Rights Committee has pointed out, States must refrain from violating human rights and may only restrict rights in accordance with the provisions set forth in the treaties.[74] Moreover, there is an obligation to act with due diligence to prevent violations of rights by taking legal, judicial and administrative measures, as well as any other measure that ensures the full enjoyment of rights.

The United Nations Declaration on Human Rights Defenders[75] clearly establishes that it is the responsibility of the State to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threat, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of rights. The Declaration also stipulates that everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.

Similarly, the United Nations Human Rights Committee, in its General Comment No. 36 (2019),[76] has determined that the duty to protect the right to life requires States parties to take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because

[74] See Human Rights Committee, "General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (CCPR/C/21/Rev.1/Add.13), New York, 2004.

[75] See United Nations, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (A/RES/53/144), New York, 1999, annex, in particular, articles 2 and 3.

[76] See Human Rights Committee, "General Comment No. 36. Article 6: right to life" (CCPR/C/GC/36), New York, 2019.

of specific threats or pre-existing patterns of violence. It explicitly states that these persons include human rights defenders. States parties must also respond urgently and effectively in order to protect individuals who find themselves under a specific threat, and must take the necessary measures to respond to death threats and to provide adequate protection to human rights defenders, including the creation and maintenance of a safe and enabling environment for defending human rights.

The former Special Rapporteur on the situation of human rights defenders, Michel Forst, likewise established important guidance for the protection of environmental defenders.[77] Protection practices should contribute to the full respect of the rights of environmental human rights defenders and strengthen their security. In his view, States must, among other things, reaffirm and recognize the role they play and respect, protect and fulfil their rights and create protection mechanisms for them, taking into account the intersectoral dimensions of the violations against women defenders, indigenous peoples and rural and marginalized communities. He also identified seven principles underpinning effective protection practices for human rights defenders: they should be rights-based, inclusive, gender-sensitive, focused on "holistic security", oriented to individuals and collectives, participatory and flexible.[78]

States have developed different protection measures and programmes to guarantee the security and personal integrity of human rights defenders in situations of imminent risk. These measures range from the establishment of specialized protection and investigation units for crimes against human rights activists, the establishment of an early warning system and protection by the police and bodyguards, to the establishment of programmes for urgent relocation of defenders to another region or country. Some States have also enacted specific legislation on the protection of human rights defenders.

Although article 9.2 stresses some of the main civil and political rights to be defended and which tend to be at greater risk for defenders (such as the right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association and freedom of movement), the list is neither exclusive nor exhaustive, since all the human rights of defenders must be protected. The article specifies the defender's ability to exercise his or her access rights, given the fundamental importance to the defence of the environment of the right to request, obtain and disseminate information, the right to participate in public affairs and the right to access justice.

The rights of defenders must be recognized, protected and promoted taking into account the international obligations of each party with regard to human rights, constitutional principles and the basic elements of the legal system. These references indicate that the domestic regulatory framework and legal system of each State party are the basis for implementing article 9.

9.3 Each Party shall also take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the present Agreement.

Under paragraph 3 of article 9, each party is required to take measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer. In addition to effectiveness, which was included in the previous paragraph, appropriateness and timeliness are underscored.

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[77] See United Nations, *Situation of human rights defenders: note by the Secretary-General* (A/71/281), New York, 2016.

[78] See Human Rights Council, "Report of the Special Rapporteur on the situation of human rights defenders: note by the Secretariat" (A/HRC/31/55), New York, 2016.

This paragraph encompasses two dimensions: prevention and response. The need for a preventive approach is a cross-cutting element that guides the application of article 9 as a whole. It is intrinsically linked to the protection of defenders and to the establishment of a safe and enabling environment, reviewed above under paragraphs 1 and 2 of the article. Prevention and protection are mutually reinforcing and essential to avoid human rights violations against defenders. A safe and enabling environment is, in itself, a powerful preventive and protective tool to ensure the security of environmental human rights defenders.

If a violation occurs in spite of a safe and conducive environment and prevention and protection measures, States are obligated to take response measures. The Escazú Agreement requires each party to take appropriate, effective and timely measures to investigate and punish attacks, threats or intimidation experienced by human rights defenders in environmental matters while exercising the rights contained in the Agreement. It obliges States to act when other persons commit human rights abuses, but also applies to State actors themselves.

Box VI.2 includes examples of acts committed against human rights defenders.

Box VI.2
Examples of acts committed against human rights defenders

- Killings
- Death threats
- Kidnappings
- Forced disappearances
- Torture and ill-treatment
- Arbitrary arrest and detention
- Undue criminal and other charges resulting in prosecution and conviction
- Unfounded and/or harassing civil actions (e.g. strategic lawsuits against public participation (SLAPP))
- All kinds of harassment
- Defamation
- Attacks on or threats to relatives, acquaintances, offices and homes
- Unauthorized searches
- Culture of impunity
- Restrictions on the environment in which human rights defenders operate, including unjustified legal, administrative and financial burdens placed on persons or organizations

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of United Nations Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 29, Human Rights Defenders: Protecting the Right to Defend Human Rights*, April 2004, No. 29.

The obligation under this paragraph is consistent with universal human rights treaties and the Declaration on Human Rights Defenders. International human rights standards require States to carry out a prompt and impartial investigation or to adopt the necessary measures for an investigation to be undertaken when there are reasonable grounds to believe that a violation of human rights and fundamental freedoms has occurred in their jurisdiction.

More precisely, the Declaration on Human Rights Defenders safeguards the right of all defenders, individually or collectively, to effective remedies and to be protected in case of violation of these rights. Any person whose rights or freedoms have allegedly been violated has the right, either on their own or through a legally authorized representative, to file a complaint before an independent, impartial and competent judicial authority or any other authority established by the law. This complaint must be examined quickly, perpetrators must be prosecuted regardless of their status, and the defender must obtain from the authority a decision, in accordance with the law, that provides for reparation, including the corresponding compensation, when his or her rights or freedoms have been violated. The decision and sentence must also be implemented without undue delay.

The United Nations Human Rights Committee has adopted a similar stance. In its General Comment No. 36 on the right to life,[79] it has indicated that investigations of alleged violations must always be independent, impartial, prompt, thorough, effective, credible and transparent, and in the event of a violation, full reparation must be provided. The obligations of the States parties include, among others, to take measures to prevent similar violations from occurring in the future and to take the necessary steps to protect witnesses, victims and their relatives and persons conducting the investigation from threats, attacks and any kind of retaliation. Furthermore, as the Committee has noted "a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the International Covenant on Civil and Political Rights. Cessation of an ongoing violation is an essential element of the right to an effective remedy".[80]

Former Special Rapporteur on the situation of human rights defenders, Michel Forst, stressed that States must guarantee independent and diligent investigations into the alleged threats and violence against environmental human rights defenders and bring direct perpetrators and those who participated in the commission of crimes to justice.[81] In his 2019 report, the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd, urged States to "prioritize action to protect environmental human rights defenders, ideally by establishing institutions and rules to address the root causes of violence and harassment, celebrating and supporting defenders' work instead of attacking it and ensuring justice by holding perpetrators of violence accountable for their actions."[82] In his 2020 report, the Special Rapporteur emphasized that States have the procedural obligation to "provide strong protection for environmental human rights defenders working on nature-related issues. States must vigilantly protect defenders from intimidation, criminalization and violence; diligently investigate, prosecute and punish the perpetrators of those crimes; and address the root causes of social-environmental conflict".[83]

Reparations are likewise an essential element of the right to an effective remedy. Article 2.3 of the International Covenant on Civil and Political Rights requires that States make reparation to individuals whose rights have been violated. In the event that a violation is determined, full reparation must be provided, including adequate measures of compensation, restitution, rehabilitation and satisfaction, "such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations". The United Nations Human Rights Committee has indicated that the absence of reparations to people whose human rights have been violated implies a breach of the obligation to provide an effective remedy.[84]

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[79] See Human Rights Committee, "General Comment No. 36. Article 6: right to life" (CCPR/C/GC/36), New York, 2019.

[80] See Human Rights Committee, "General Comment No. 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (CCPR/C/21/Rev.1/Add. 13), New York, 2004.

[81] See United Nations, *Situation of human rights defenders: note by the Secretary-General* (A/71/281), New York, 2016.

[82] See Human Rights Council, "Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: report of the Special Rapporteur" (A/HRC/40/55), New York, 2019.

[83] See United Nations, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: note by the Secretary-General* (A/75/161), New York, 2020.

[84] See Human Rights Committee, "General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (CCPR/C/21/Rev.1/Add.13), New York, 2004.

VII. Capacity-building and cooperation

One of the salient features of the Escazú Agreement is its focus on capacity-building and cooperation. During the preparatory and negotiation phases, countries were cognizant of the different capacities and levels of implementation of environmental access rights in the region and agreed that further capacity-building and cooperation was needed in these matters.

The Latin American and Caribbean region reflects different contexts and realities. In some cases, stronger legal, policy and institutional frameworks are required, while in others, robust systems exist but effective implementation is needed to reach all sectors of society. Implementation is a continuous process that goes hand-in-hand with capacity-building and cooperation as there are always opportunities for improvement and for ensuring access rights are better implemented.

Capacity-building and cooperation are included from the outset in the preamble and objective of the Agreement and are considered a driving force of the treaty as a whole. They constitute a cross-cutting pillar that supports the implementation of and compliance with all the other provisions of the Escazú Agreement. This has been the case since its inception, as expressed in the San José Content and recognized in the Lima Vision for a regional instrument on access rights relating to the environment in the early preparatory phase of the agreement. The Lima Vision acknowledges the considerable progress the region has made and the challenges faced in the full implementation of access rights. It highlights cooperation and capacity-building as essential for narrowing gaps in the implementation of principle 10 of the Rio Declaration on Environment and Development.

Following this trend, under the Escazú Agreement, article 10 is devoted specifically to capacity-building and article 11 to cooperation. These articles are based on the belief that partnerships among States within and outside the region, intergovernmental, non-governmental, academic and private organizations, as well as civil society organizations and other relevant stakeholders are likewise key to implementing the Agreement. Article 12 establishes a clearing house on access rights in support of the implementation of the provisions.

Owing to the relevance of capacity-building and cooperation in the general framework of the Escazú Agreement, both issues are addressed jointly in one chapter.

In addition to articles 10, 11 and 12, the Agreement also provides for an institutional architecture aimed, among other things, at building capacities and fostering cooperation in support of treaty implementation. It includes a voluntary fund, the Conference of the Parties, the Committee to Support Implementation and Compliance and the secretariat. For example, the Conference of the Parties may formulate recommendations on treaty implementation and support mobilization of resources, the secretariat shall provide assistance to parties upon their request and the Committee to Support Implementation and Compliance may support the building of such capacities. This institutional architecture is analysed in chapter VIII.

Table VII.1 provides an overview of the main obligations contained in articles 10, 11 and 12 along with practical guidance for their implementation.

Table VII.1
Main obligations contained in articles 10, 11 and 12 of the Escazú Agreement and implementation guidance

Article 10		
Provision	**Obligation**	**Implementation guidance**
Paragraph 1	Create and strengthen national capacities	- The objective is to contribute to the implementation of the Agreement - Based on the party's priorities and needs
Paragraph 2	Take capacity-building measures	- The list of measures is indicative - The fulfilment of the obligation must be in line with the party's capacities
Article 11		
Provision	**Obligation**	**Implementation guidance**
Paragraph 1	Cooperate with other parties to strengthen national capacities	- The ultimate aim of cooperation is the strengthening of national capacities to implement the Agreement
Paragraph 2	Give particular consideration to least developed countries, landlocked developing countries and small island developing States	- Recognized categories under the United Nations - The sole purpose is to enhance cooperation to strengthen national capacities for the implementation of the Agreement
Paragraph 3	Promote cooperation activities and mechanisms to implement paragraph 2	- Provides examples of activities and mechanisms such as workshops, expert exchanges and technical assistance
Paragraph 4	Encourage partnerships with different stakeholders	- Bilateral and multilateral cooperation among States within and outside the region - Cooperation between the public, public officials and national authorities
Paragraph 5	Promote regional cooperation and information-sharing in relation to illicit activities	- Relates to all aspects of illicit activities against the environment - May be supported by different mechanisms for international legal cooperation
Article 12		
Obligation		**Implementation guidance**
Establish a virtual and universally accessible clearing house on access rights		- May include legislative, administrative and policy measures and good practices - Operated by the secretariat

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of the Escazú Agreement.

A. Article 10 – Capacity-building

10.1. In order to contribute to the implementation of the provisions of the present Agreement, each Party undertakes to create and strengthen national capacities, based on its priorities and needs.

Parties are required to create and strengthen national capacities to enable the implementation of the Escazú Agreement. These requirements are also included in the objective of the Agreement.

This provision recognizes that all countries are not on the same level in terms of their capacity to grant full and effective access rights and states that parties should implement the obligation based on their "priorities and needs".

To implement this obligation, for example, national assessments and implementation plans of legal and administrative frameworks, practices and resources may be useful to identify gaps and challenges. These assessments and results are dynamic, may change over time and facilitate implementation at different stages. This obligation must be read in conjunction with article 13 (on national implementation).

Capacity-building may focus on the systemic, institutional or individual levels and is aimed at State and non-State actors.

10.2. Each Party, in line with its capacities, may take, inter alia, the following measures:
(a) train authorities and civil servants on environmental access rights;
(b) develop and strengthen environmental law and access rights awareness-raising and capacity-building programmes for, inter alia, the public, judicial and administrative officials, national human rights institutions and jurists;
(c) provide the competent institutions and entities with adequate equipment and resources;
(d) promote education and training on, and raise public awareness of, environmental matters, through, inter alia, basic educational modules on access rights for students at all levels of education;
(e) develop specific measures for persons or groups in vulnerable situations, such as providing interpreters or translators in languages other than official languages when necessary;
(f) acknowledge the importance of associations, organizations or groups that train the public on or raise public awareness of access rights; and
(g) strengthen capabilities to collect, retain and evaluate environmental information.

This paragraph provides guidance to parties on a wide range of measures that may be undertaken to build their capacities to implement the Agreement through an indicative, illustrative and voluntary list of measures in letters (a) to (g):

(a) Train authorities and civil servants on environmental access rights.

Specialized training on environmental access rights for authorities and civil servants will provide the requisite knowledge and skills to implement the provisions of the Agreement. This provision is relevant to all authorities, inclusive of the competent authorities outlined in article 5 and 6. If public officials are not adequately trained on access rights, parties will have difficulties implementing the provisions of the Agreement and ensuring compliance.

Training may include the development of training materials and the provision of education on the relevant laws, procedures and best practices related to access rights, among others.

(b) Develop and strengthen environmental law and access rights awareness-raising and capacity-building programmes for, inter alia, the public, judicial and administrative officials, national human rights institutions and jurists.

This subparagraph recognizes the essential roles played by the different actors: the public as users of access rights and officials as service providers and adjudicators.

Knowledge and understanding of environmental law and of the scope and procedures for access rights provide a critical basis for the public to be able to effectively exercise their access rights. It is also key to enable judicial and administrative officials, national human rights institutions and jurists to oversee implementation and ensure compliance.

Raising the public's awareness of access rights, including relevant rules and procedures, will also enable the public to challenge violations of these rights and in so doing foster accountability and strengthen mechanisms for access to justice.

(c) Provide the competent institutions and entities with adequate equipment and resources.

Parties may strengthen the capacities of the entities responsible for implementing the Agreement by providing adequate equipment and resources as outlined in provision 10.2(c). The reference to competent institutions and entities includes those with specific responsibilities to ensure the effective delivery of access rights.

Relevant resources may be financial, technical and human support to facilitate and respond to requests for information, disseminate environmental information, develop and maintain environmental information systems, pollutant release and transfer registers and early warning systems, and to facilitate public participation and access to justice procedures.

(d) Promote education and training on, and raise public awareness of, environmental matters, through, inter alia, basic educational modules on access rights for students at all levels of education.

This provision highlights the importance of not only the training and education of public officials responsible for implementing the provisions of the Agreement, but also of raising awareness among the public at various levels, including among students. Incorporating education on access rights into the school curriculum is one way to institutionalize learning about access rights and improve knowledge among the youngest stakeholders.

(e) Develop specific measures for persons or groups in vulnerable situations, such as providing interpreters or translators in languages other than official languages when necessary.

Parties may develop specific capacity-building measures to help persons or groups in vulnerable situations to exercise their access rights. One example referenced in this provision is the use of interpreters or translators in languages other than official languages. This is intended to ensure that language is not a barrier to the exercise of access rights and is specifically recognized in the Agreement

provisions concerning the dissemination of environmental information in various languages used in the party's country (article 6.6) and to facilitate access to justice (article 8.4(d)).

Notwithstanding the specific reference to language, other relevant measures may be needed to facilitate the exercise of access rights by persons and groups in vulnerable situations. These measures should be appropriate and suited to the needs of the specific persons and groups and will depend on the national context in each country.

Articles 5, 6, 7 and 8 include specific provisions for facilitating access rights for persons and groups in vulnerable situations. These also reinforce the general obligation under article 4.5 to provide guidance and assistance to these persons.

(f) Acknowledge the importance of associations, organizations or groups that train the public in or raise public awareness of access rights.

This provision also calls upon parties to recognize the important role played by entities such as associations, organizations or groups in training and raising awareness of access rights. Parties have flexibility to determine how they choose to acknowledge the role of civil society in capacity-building. Partnerships with civil society are often very useful in bridging gaps in resources and conducting outreach to communities that may have closer relationships with civil society associations and organizations.

(g) Strengthen capabilities to collect, retain and evaluate environmental information.

Parties may strengthen their capabilities to collect, retain and evaluate environmental information. This provision supports the obligations under article 6 to proactively disseminate information. In particular, article 6.1 requires parties to generate, collect, publicize and disseminate environmental information in a systematic, proactive, timely, regular, accessible and comprehensible manner, and to periodically update this information. These standards may be met if parties have the appropriate capacities.

The measures listed in article 10.2 subparagraphs (a) to (g) are only indicative and parties may implement additional or other measures. The provision indicates that these measures may be undertaken by parties "in line with [their] capacities" recognizing that the ability of a party to implement these measures is determined by their domestic resources.

B. Article 11 – Cooperation

11.1. The Parties shall cooperate to strengthen their national capacities with the aim of implementing the present Agreement in an effective manner.

The parties have a broad common obligation to cooperate with each other to strengthen their national capacities with the aim of implementing the Escazú Agreement effectively. Cooperation is based on good faith and equal footing among parties. It shall also respect the principles outlined under article 3, including sovereign equality and permanent sovereignty over natural resources.

Cooperation is a core obligation and principle of international law, enshrined in both customary law and treaty law. International cooperation is one of the purposes of the United Nations (article 1.3 of the Charter of the United Nations) and pursuant to Chapter IX of the Charter of the United Nations, all Member States pledge to take joint action for economic, social and human rights purposes. In the same vein, article 2.1 of the International Covenant on Economic, Social and Cultural Rights mandates each State party to realize the rights contained therein "individually and through international assistance and co-operation". The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations is also based on cooperation.[85]

This obligation to combine efforts for a common purpose has also been translated into the environmental arena. The Declaration of the United Nations Conference on the Human Environment of 1972 (Stockholm Declaration) and the Rio Declaration on Environment and Development of 1992 (Rio Declaration) refer to international cooperation on environmental management and protection. According to principle 27 of the Rio Declaration, for example, States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in the Declaration and in the further development of international law in the field of sustainable development. In turn, multilateral environmental agreements call on and are grounded in inter-State cooperation. A few examples are articles 3 of the United Nations Framework Convention on Climate Change and of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, and article 5 of the Convention on Biological Diversity.

For the purposes of the Escazú Agreement, cooperation is expressly framed within the strengthening of national capacities to implement the treaty. Paragraph 3 of the article, though referring to specific examples of cooperation that may give particular consideration to certain groups of countries, also offers indications as to what types of mechanisms and activities fall under general cooperation. Cooperation among States may boost and support national initiatives aimed at capacity-building through the sharing of technical or financial assistance, training, information-sharing and technology transfer.

As this is a general obligation for all parties, no party may be forced to cooperate with another specific party. States may either cooperate on a bilateral or multilateral level, with some or all parties. As a result, cooperation may either be through the Conference of the Parties (COP) or between parties at the State-to-State level. Cooperation may also include the provision of financial resources to the voluntary fund of the Escazú Agreement as outlined in article 14.

11.2. The Parties shall give particular consideration to least developed countries, landlocked developing countries and small island developing States from Latin America and the Caribbean.

Under the cooperation framework to strengthen national capacities for the treaty's implementation, parties are required to "give particular consideration" to least developed countries (LDCs), landlocked developing countries (LLDCs) and small island developing States (SIDS) in the region.

This paragraph recognizes that a specific group of countries may experience challenges particular to them as a result of their special situation and circumstances. For example, SIDS are particularly vulnerable to the

[85] See United Nations, "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations" (A/RES/2625(XXV)), New York, 1970, annex, in particular "the duty of States to co-operate with one another in accordance with the Charter".

impacts of climate change, specifically natural disasters. These countries find it more challenging to adapt to and recover from these events because of their small economies. In turn, LDCs tend to have fewer resources and capacities to implement international agreements.

This provision is based on a central and cross-cutting feature of international environmental law: the need to give special attention to the specific situation and needs of certain categories of countries, particularly the least developed and the most environmentally vulnerable. This reference is common to many multilateral environmental agreements (see table VII.2) and aims to address equity and fairness, allowing all parties —even those with particular challenges and needs— to equally contribute to the effective implementation of the Agreement. This provision also reflects solidarity among parties to meet the common objective under the Agreement and is the extrapolation at the inter-State level of the principle of equality within countries that requires due attention to be given to specific groups facing particular challenges. This paragraph also recognizes the universality of environmental law obligations and challenges.

Table VII.2
Multilateral environmental agreements with references to specific groups of countries

Instrument	Paragraph/article
The Vienna Convention for the Protection of the Ozone Layer, 1985	Preamble: "Taking into account the circumstances and particular requirements of developing countries."
United Nations Framework Convention on Climate Change, 1992	Article 3.2. "The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration". Article 4.8 "In the implementation of the commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on: (a) Small island countries; (b) Countries with low-lying coastal areas; (c) Countries with arid and semi-arid areas, forested areas and areas liable to forest decay; (d) Countries with areas prone to natural disasters; (e) Countries with areas liable to drought and desertification; (f) Countries with areas of high urban atmospheric pollution; (g) Countries with areas with fragile ecosystems, including mountainous ecosystems; (h) Countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products; and (i) Landlocked and transit countries. Further, the Conference of the Parties may take actions, as appropriate, with respect to this paragraph."
Convention on Biological Diversity, 1992	Article 20.5. "The Parties shall take full account of the specific needs and special situation of least developed countries in their actions with regard to funding and transfer of technology."

Instrument	Paragraph/article
	Article 20.6. "The Contracting Parties shall also take into consideration the special conditions resulting from the dependence on, distribution and location of, biological diversity within developing country Parties, in particular small island States." Article 20.7. "Consideration shall also be given to the special situation of developing countries, including those that are most environmentally vulnerable, such as those with arid and semi- arid zones, coastal and mountainous areas."
United Nations Convention to Combat Desertification, 1994	Article 3: "In order to achieve the objective of this Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following: (…) (d) The Parties should take into full consideration the special needs and circumstances of affected developing country Parties, particularly the least developed among them."
Stockholm Convention on Persistent Organic Pollutants, 2001	Article 13.5. "The Parties shall take full account of the specific needs and special situation of the least developed countries and the small island developing states in their actions with regard to funding (…)."
Minamata Convention, 2013	Article 13.3. "Multilateral, regional and bilateral sources of financial and technical assistance, as well as capacity-building and technology transfer, are encouraged, on an urgent basis, to enhance and increase their activities on mercury in support of developing country Parties in the implementation of this Convention relating to financial resources, technical assistance and technology transfer." Article 14.1. "Parties shall cooperate to provide, within their respective capabilities, timely and appropriate capacity-building and technical assistance to developing country Parties, in particular Parties that are least developed countries or small island developing States, and Parties with economies in transition, to assist them in implementing their obligations under this Convention."
Paris Agreement, 2015	Article 4.6. "The least developed countries and small island developing States may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances." Article 11.1. "Capacity-building under this Agreement should enhance the capacity and ability of developing country Parties, in particular countries with the least capacity, such as the least developed countries, and those that are particularly vulnerable to the adverse effects of climate change, such as small island developing States, to take effective climate change action, including, inter alia, to implement adaptation and mitigation actions, and should facilitate technology development, dissemination and deployment, access to climate finance, relevant aspects of education, training and public awareness, and the transparent, timely and accurate communication of information." Article 13.3. "The transparency framework shall build on and enhance the transparency arrangements under the Convention, recognizing the special circumstances of the least developed countries and small island developing States, and be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties."

Source: Economic Commission for Latin America and the Caribbean (ECLAC).

The three groups of countries identified in this paragraph have traditionally received specific attention in United Nations frameworks and are the object of specific programmes of action (see table VII.3). The outcome document of the United Nations Conference on Sustainable Development (Rio+20) reaffirmed these commitments (paragraph 16) and also recognized "that each country faces specific challenges to achieve sustainable development, and we underscore the special challenges facing the most vulnerable countries and, in particular, African countries, least developed countries, landlocked developing countries and small island developing States, as well as the specific challenges facing the middle-income countries. Countries in situations of conflict also need special attention." (paragraph 32). Concrete references to these groups of countries may also be found throughout the document: SIDS (paragraphs 33 and 178-180), LDCs (paragraphs 34 and 181) and LLDCs (paragraphs 36 and 182).

Table VII.3
Categories of countries subject to special consideration under United Nations frameworks

	Least developed countries (LDCs)	**Landlocked developing countries (LLDCs)**	**Small island developing states (SIDS)**
Current applicable United Nations framework	Istanbul Programme of Action	Vienna Declaration and Programme of Action	SIDS Accelerated Modalities of Action (SAMOA) Pathway Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States
Countries in Latin America and the Caribbean	• Haiti	• Bolivia (Plurinational State of) • Paraguay	• Antigua and Barbuda • Bahamas • Barbados • Belize • Cuba • Dominica • Dominican Republic • Grenada • Guyana • Haiti • Jamaica • Saint Kitts and Nevis • Saint Lucia • Saint Vincent and the Grenadines • Suriname • Trinidad and Tobago

Source: Economic Commission for Latin America and the Caribbean (ECLAC) and Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States.

The obligation is likewise aligned with the commitment under the 2030 Agenda for Sustainable Development to ensure that the Agenda's goals and targets are met for all nations and people and for all segments of society, leaving no one behind. United Nations Member States pledged to "endeavour to reach the furthest behind first" (paragraph 4) and underscored that "the most vulnerable countries and, in particular, African countries, least

developed countries, landlocked developing countries and small island developing States, deserve special attention, as do countries in situations of conflict and post-conflict countries" (paragraph 22). Furthermore, these groups of countries are mentioned, inter alia, in Goals 7b and 10b.

For the purposes of the Escazú Agreement, the particular consideration given to these categories of countries is solely intended to enhance cooperation with a view to strengthening national capacities for the implementation of the Agreement, and does not factor in any other consideration. The principles of the Escazú Agreement, such as good faith, permanent sovereignty of States over their natural resources and sovereign equality of States, are fully applicable and guide the implementation of article 11. South-South cooperation among the countries of Latin America and the Caribbean may drive progress in those countries in special or vulnerable situations.

Prioritizing the needs of these countries in financial support mechanisms and capacity-building programmes is a way to ensure that they receive particular consideration. Paragraph 11.2 must be read in conjunction with paragraph 11.3, which offers an illustrative list of activities and mechanisms to implement this obligation.

> 11.3. For the purposes of implementing paragraph 2 of the present article, the Parties shall promote activities and mechanisms, such as:
> (a) discussions, workshops, expert exchanges, technical assistance, education and observatories;
> (b) developing, sharing and implementing educational, training and awareness-raising materials and programmes;
> (c) sharing experiences of voluntary codes of conduct, guidelines, good practices and standards; and
> (d) committees, councils and forums of multisectoral development stakeholders to address cooperation priorities and activities.

Parties are commonly obligated under paragraph 3 of article 11 to promote activities and mechanisms related to building the capacities of LDCs, SIDS and LLDCs of the region for the purposes of implementing the Agreement.

Subparagraphs (a) to (d) provide an indicative, illustrative and voluntary list of possible activities and mechanisms. These are:

(a) Discussions, workshops, expert exchanges, technical assistance, education and observatories.

There are non-financial activities that may improve the capacities of LDCs, SIDS and LLDCs. Discussions, workshops, expert exchanges, technical assistance, education and observatories are awareness-raising activities that develop the competencies and skills of State authorities and of the public and that may increase effectiveness and strengthen procedures for access rights, thereby making them more sustainable. These may also include measures for institutional strengthening such as technical assistance in developing appropriate policy, legislative and regulatory frameworks for implementation of the Agreement.

(b) Developing, sharing and implementing educational, training and awareness-raising materials and programmes.

Parties may also develop, share and implement educational, training and awareness-raising materials and programmes related to access rights for State authorities, the public and other entities. Conducting national assessments may help to identify which areas require more attention and may be used as the basis to develop the programmes and materials. These programmes should be flexible and dynamic, ensuring that they are appropriate for the stages of development of the target country and the specific context in which it operates, and may be adapted over time based on changing needs.

(c) Sharing experiences of voluntary codes of conduct, guidelines, good practices and standards.

There may be parties to the Escazú Agreement, international organizations or civil society organizations that have developed voluntary codes, guidelines, good practices and standards related to access rights. These may be shared among parties to enhance the implementation of access rights in the region.

(d) Committees, councils and forums of multisectoral development stakeholders to address cooperation priorities and activities.

Parties may establish committees, councils and forums with different stakeholders to discuss cooperation for the strengthening of national capacities to implement the Agreement more effectively.

11.4. The Parties shall encourage partnerships with States from other regions, intergovernmental, non-governmental, academic and private organizations, as well as civil society organizations and other relevant stakeholders to implement the present Agreement.

Parties are required to "encourage" partnerships to implement the Escazú Agreement. There are many ways in which parties may establish partnerships to further the objective of granting full and effective access rights and the provision does not attempt to specify one way.

This provision considers a wide range of actors as possible partners. These include States from other regions, intergovernmental, non-governmental, academic and private organizations, and civil society organizations. The provision does not offer an exhaustive list, recognizing that there may be "other relevant stakeholders".

Partnerships with States of other regions and intergovernmental organizations may also further synergies in other international decision-making forums.

There may also be partnerships between the bodies of the Agreement and parties.

11.5. The Parties recognize that regional cooperation and information-sharing shall be promoted in relation to all aspects of illicit activities against the environment.

Paragraph 5 focuses on a particular area in which parties may cooperate with each other: illicit activities that negatively affect the environment. Parties recognize that regional cooperation and information-sharing shall be promoted in relation to all aspects of illicit activities against the environment. Illicit environmental activities may have far-reaching and transboundary impacts that threaten multiple States and public goods and contribute to global environmental problems such as the loss of biological diversity, the increase of pollutants in the atmosphere and climate change.

One example of how regional cooperation and information-sharing may address illicit activities that may negatively affect the environment is the tackling of illegal international trade of endangered species through the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Parties to the Convention are required to implement permitting regimes to control the import and export of endangered species. Exporting countries must ensure that import permits have first been obtained from importing countries for certain species. Other areas of regional cooperation and information-sharing include the control of the movement of transboundary waste under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the Basel Convention).

In addition to the above, there are different mechanisms for international legal cooperation to which States parties may recur with respect to illicit activities against the environment. These include extradition and cooperation in judicial proceedings, mutual legal assistance, transfer of criminal proceedings, transfer of convicted persons, recognition of decisions of foreign criminal jurisdictions, freezing or seizure of assets and cooperation between law enforcement agencies.

C. Article 12 – Clearing house

> The Parties shall have a virtual and universally accessible clearing house on access rights. The clearing house will be operated by the Economic Commission for Latin America and the Caribbean, in its capacity as Secretariat, and may include, inter alia, legislative, administrative and policy measures, codes of conduct and good practices.

Under article 12, the Escazú Agreement establishes a clearing house on access rights to be operated by the secretariat. Clearing houses are common to multilateral environmental agreements and are intended to foster the exchange of information among parties and stakeholders, as well as to promote knowledge and awareness on specific topics. Information contained in clearing houses can also be used to monitor, track and analyse progress among parties.

The provision specifies that this mechanism shall be "virtual" and "universally accessible", indicating that it should be open to the general public and available online. In terms of the content, the article is non-exhaustive and indicates that it can include "legislative, administrative and policy measures, codes of conduct and good practices". Other types of material not specifically listed may be included.

In relation to this obligation, ECLAC has created the Observatory on Principle 10 in Latin America and the Caribbean,[86] which includes treaties, legislation, policies and jurisprudence on access rights in Latin American and Caribbean countries and on related topics such as climate change, biodiversity and environmental defenders.

The Observatory is composed of information of public nature or access, as well as information voluntarily provided by countries. It operates fundamentally as a repository of laws and policies, allowing representatives of governments, civil society, the private sector, the academic sector and any interested person to access documents in one place. It also provides resources and visual and outreach materials that assist in processing the data and information contained therein, as appropriate.

[86] See [online] https://observatoriop10.cepal.org/en.

VIII. Institutional provisions

As outlined in article 13, the implementation of the Escazú Agreement is primarily the responsibility of each State party, which shall fulfil the obligations derived from the treaty at the national and regional levels. However, to be truly successful, this implementation may require the support of bodies and institutions at the international level, including financial instruments. Moreover, like most treaties, the Escazú Agreement requires its own bodies to effectively meet its objectives.

Articles 13–18 establish the institutional architecture of the Escazú Agreement, covering a wide range of issues that are essential for its existence, management, governance and full implementation. Although instrumental, these provisions have a significant impact on substantive matters, ensuring the treaty's easy operation and facilitating its implementation by all concerned.

The institutional framework of the Escazú Agreement follows the experience of the latest-generation multilateral treaties, in particular treaties on environmental matters. In this vein, the following bodies have been established: voluntary fund, Conference of the Parties, secretariat and Committee to Support Implementation and Compliance.

This institutional framework is intended to be agile and efficient. Although the text of the Agreement focuses on the bodies considered essential to achieve the objective and aims of the Agreement at the time of adoption, these will need to be further developed and strengthened as required and as the implementation of the Agreement progresses. In that regard, like other treaties, the Escazú Agreement may be considered a living instrument that must evolve along with the situation, context and needs of the parties and the region. The institutional provisions lay the groundwork and allow, together with article 20 on amendments, for this future development when required.

The Escazú Agreement only defines the basic structure of each body and some elements of the institutional framework were purposely left for future consideration. For example, the adoption of the rules of procedure of the Conference of the Parties, the rules relating to the structure and functions of the Committee to Support Implementation and Compliance and the necessary financial arrangements (such as the terms of reference of the voluntary fund) are to be discussed at the first meeting of the Conference of the Parties. As these matters are still subject to the discussion and decision of parties, the present guide will not elaborate on them extensively.

Table VIII.1 provides an overview of the main obligations contained in articles 13–18 and practical guidance for their implementation.

Table VIII.1
Main obligations contained in articles 13–18 of the Escazú Agreement and implementation guidance

Article 13		
Obligation		**Implementation guidance**
Commit to provide the resources for national activities needed to fulfil the obligations of the Agreement		- To the extent of each party's ability - In accordance with national priorities
Article 14		
Provision	**Obligation**	**Implementation guidance**
Paragraph 1	Establish a voluntary fund	- Functioning to be defined by the Conference of the Parties
Paragraph 2	Parties may make voluntary contributions	- Voluntary contributions are intended to support the implementation of the Agreement
Paragraph 3	Parties may seek funds from other sources	- To be decided by the Conference of the Parties in accordance with paragraph 5(g) of article 15
Article 15		
Provision	**Obligation**	**Implementation guidance**
Paragraph 1	Establish a Conference of the Parties	- Main governing body of the Agreement, composed of all parties
Paragraph 2	Convene the first meeting of the Conference of the Parties no later than one year after the entry into force of the Agreement	- To be convened by the Executive Secretary of ECLAC - Subsequent ordinary meetings to be held at regular intervals as defined by the Conference of the Parties
Paragraph 3	Hold extraordinary meetings when necessary	- When deemed necessary by the Conference of the Parties
Paragraph 4	At the first meeting, discuss and adopt rules of procedure and financial provisions	- Rules of procedure shall include the modalities for significant participation by the public - Adoption of both rules of procedure and financial provisions shall be by consensus
Paragraph 5	Examine and promote the implementation and effectiveness of the Agreement	- Any necessary subsidiary bodies shall be established by consensus - Parties shall inform of implementation measures - The Conference of the Parties may make recommendations to parties - The Conference of the Parties may examine and adopt any additional measures needed to achieve the treaty's objective
Article 16		
Obligation		**Implementation guidance**
Each party shall have one vote		- Expression of sovereign equality of States

Article 17		
Provision	**Obligation**	**Implementation guidance**
Paragraph 1	Designate the secretariat	- Executive Secretary of ECLAC to carry out the secretariat functions
Paragraph 2	Secretariat shall exercise its functions	- Assist the Conference of the Parties and the parties in the implementation of the Agreement
Article 18		
Provision	**Obligation**	**Implementation guidance**
Paragraph 1	Establish a Committee to Support Implementation and Compliance	- The Committee is a subsidiary body of the Conference of the Parties - Promotes implementation and supports parties - Rules on the structure and functions shall be defined by the Conference of the Parties at its first meeting
Paragraph 2	Define certain characteristics of the Committee	- The Committee is consultative, transparent, non-adversarial, non-judicial, non-punitive - Shall review compliance and formulate recommendations - The significant participation of the public shall be ensured - Particular attention shall be paid to the national capacities and circumstances of the parties

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of the Escazú Agreement.

A. Article 13 – National implementation

Each Party, to the extent of its ability and in accordance with its national priorities, commits to provide the resources for national activities that are needed to fulfil the obligations derived from the present Agreement.

Article 13 refers to national implementation by each party. Since each party is primarily responsible for the implementation of the Agreement at the national level, the article requires each one to commit resources to those national activities needed to fulfil their obligations to the extent of their ability and in accordance with national priorities.

Although the text of this provision seems to put a particular focus on one of the elements required for national implementation (i.e. the provision of resources for necessary national activities), article 13 is not a stand-alone provision and should be read in a broader context. Explicit mention must be made of the general mandate contained in article 4.3 whereby each party shall adopt the necessary measures to guarantee the implementation of the Agreement.

The reference to resources is not limited to financial or economic resources, but also encompasses other types that may be needed, such as human, physical or intellectual. Moreover, the wording "national activities that are needed" reflects that breadth which generally includes any means that may be required to implement the obligations contained in the Agreement. Hence, article 13 has a direct correlation with article 4.3.

As is made patent in the article, this obligation must be fulfilled in accordance with each party's ability and national priorities. This offers a dynamic and evolving aspect that must be taken into account when analysing the provision of resources, as those capacities and priorities may vary over time. However, this does not mean that each party has absolute discretion of action. The overall objective of the Agreement, its principles and the other obligations set out in the Agreement continue to apply, particularly the general commitment to adopt the necessary measures to implement its provisions.

B. Article 14 – Voluntary fund

14.1. A Voluntary Fund is hereby established to support the financing of the implementation of the present Agreement, the functioning of which shall be defined by the Conference of the Parties.
14.2. Parties may make voluntary contributions to support the implementation of the present Agreement.
14.3. The Conference of the Parties may seek, in accordance with paragraph 5(g) of article 15 of the present Agreement, to obtain funds from other sources to support the implementation of the present Agreement.

To support the financing of its implementation, the Agreement provides for a voluntary fund, an instrument which is commonly used to finance international programmes. The inclusion of the creation of the fund in the treaty text itself is noteworthy, as this underscores its role as a fundamental tool to support implementation.

Article 14 states that the fund is voluntary, meaning that the parties make contributions if they wish. Although the article does not mention other contributors, the possibility of receiving voluntary contributions from other sources is not expressly excluded.

The rules governing the voluntary fund shall be defined by the Conference of the Parties, in accordance with the general mandate of the Conference of the Parties outlined in article 15. Pursuant to article 15.4, at its first meeting the Conference of the Parties shall discuss and adopt the financial provisions necessary for the functioning and implementation of the Agreement. Furthermore, article 15.5(g) mandates this body to establish guidelines and modalities for mobilizing financial and non-financial resources from various sources to facilitate implementation.

As a result, the overall terms of reference, functioning and regulations of the voluntary fund will be decided by the Conference of the Parties. Nonetheless, its administration must comply with the rules, regulations, norms and standards of the United Nations Secretariat.

C. Article 15 – Conference of the Parties

15.1. A Conference of the Parties is hereby established.

The Conference of the Parties is established in article 15 as the primary and highest decision-making body of the Agreement that brings together all the States parties regularly and is charged with keeping implementation and effectiveness under permanent review, evaluation and development.

Hence, the Conference of the Parties is the cornerstone of the institutional framework of the Agreement, both from the perspective of its composition and from the perspective of its competencies. The other bodies set up by the Agreement will work under the authority of the Conference of the Parties.

15.2. The Executive Secretary of the Economic Commission for Latin America and the Caribbean shall convene the first meeting of the Conference of the Parties no later than one year after the entry into force of the present Agreement. Subsequently, ordinary meetings of the Conference of the Parties shall be held at regular intervals to be decided by the Conference.
15.3. Extraordinary meetings of the Conference of the Parties shall be held when the Conference deems necessary.

Paragraphs 2 and 3 of article 15 determine the type and timing of the meetings of the Conference of the Parties, which may be convened on both an ordinary and an extraordinary basis.

The ordinary meetings must be held in regular time frames. The first meeting of the Conference of the Parties shall be convened by the Executive Secretary of ECLAC no later than one year after the entry into force of the treaty which occurred on 22 April 2021. Thereafter, the Conference of the Parties shall hold ordinary meetings at regular intervals to be decided by the same Conference.

Article 15.2 does not define the duration of the "regular intervals" between two Conferences of the Parties, but mandates States to identify the length of those "regular intervals". The regularity of intervals is a guarantee for the necessary predictability of the Conference's activity and the efficient management and development of the Agreement.

Extraordinary meetings shall be held when the Conference deems necessary. The rules of procedure of the Conference should outline the requirements for convening and the rules for holding an extraordinary meeting.

15.4 At its first meeting, the Conference of the Parties shall: (a) discuss and adopt by consensus its rules of procedure, including the modalities for significant participation by the public; and (b) discuss and adopt by consensus the financial provisions that are necessary for the functioning and implementation of the present Agreement.

The first meeting of the COP is particularly important, as the Agreement expressly establishes that three matters shall be discussed on that occasion in its articles 15.4 and 18.1:

1. The rules of procedure, including the modalities for significant participation by the public.
2. The financial provisions that are necessary for the functioning and implementation of the Agreement.
3. The rules relating to the structure and functions of the Committee to Support Implementation and Compliance.

In the context of the first meeting of the Conference of the Parties, the reference to the significant participation of the public in the rules of procedure of the Conference is of special importance as this issue is at the core of the Conference and of the institutional architecture of the Agreement as a whole. This significant participation was a hallmark of the negotiation process[87] and is further emphasized in the functioning and structure of the Committee to Support Implementation and Compliance.

15.5. The Conference of the Parties shall examine and promote the implementation and effectiveness of the present Agreement. To that end:
(a) it shall establish by consensus such subsidiary bodies as it deems necessary for the implementation of the present Agreement;
(b) it shall receive and consider reports and recommendations from subsidiary bodies;
(c) it shall be informed by the Parties of the measures adopted to implement the present Agreement;
(d) it may formulate recommendations to the Parties on the implementation of the present Agreement;
(e) it shall prepare and adopt, as applicable, protocols to the present Agreement for its subsequent signature, ratification, acceptance, approval and accession;
(f) it shall examine and adopt proposals to amend the present Agreement in accordance with the provisions of article 20 of the present Agreement;
(g) it shall establish guidelines and modalities for mobilizing financial and non-financial resources from various sources to facilitate the implementation of the present Agreement;
(h) it shall examine and adopt any additional measures needed to achieve the objective of the present Agreement; and
(i) it shall perform any other function assigned to it by the present Agreement.

Paragraph 5 focuses on the specific functions attributed to the Conference of the Parties to examine and promote the implementation and effectiveness of the Escazú Agreement.

These functions are diverse and wide-ranging but may be grouped into four general categories: (i) institutional arrangements; (ii) measures to promote implementation and compliance; (iii) financial issues; and (iv) issues related to the formal development and amendment of the Agreement. The list is, however, non-exhaustive. Subparagraph 15.5(h) leaves the functions open-ended and 15.5(i) covers all other responsibilities stipulated in other parts of the treaty. To that effect, the Conference of the Parties shall also examine and adopt any additional measures needed to achieve the objective of the Agreement and perform any other function assigned by the Agreement.

[87] See Economic Commission for Latin America and the Caribbean (ECLAC), "Modalities for participation of the public in the negotiating committee of the regional agreement on access to information, participation and justice in environmental matters in Latin America and the Caribbean", *Report of the third meeting of the negotiating committee of the regional agreement on access to information, participation and justice in environmental matters in Latin America and the Caribbean* (LC/L.4163), Santiago, 2016.

Within the institutional arrangements category, the Conference of the Parties is entitled to establish any subsidiary body it deems necessary for the implementation of the Agreement and receive and consider reports and recommendations from these bodies. It should be noted that the Agreement already establishes one these subsidiary bodies, the Committee to Support Implementation and Compliance, in its article 18. The Conference of the Parties shall likewise provide guidance to the other bodies of the Agreement. For example, it shall guide the secretariat's functions in the terms set out in article 17. In addition, article 19 entrusts it with the function of preparing the procedures for arbitration as a means of dispute settlement.

A second set of functions linked with the role of the aforementioned subsidiary bodies is structured around the support for implementation of and compliance with the Agreement. As the primary decision-making body of the Agreement, the Conference of the Parties has an important agenda and priority-setting function and exercises the highest possible authority over implementation and compliance. To that end, the Conference will not only receive reports and recommendations from subsidiary bodies but shall also be informed by the parties of implementation measures and may formulate recommendations on implementation. Additionally, it shall examine and adopt any additional measure needed to achieve the objective of the Agreement.

A third group of functions refers to resources and financial arrangements. Paragraph 15.5 mandates the Conference of the Parties to establish guidelines and modalities for mobilizing resources (both financial and non-financial) from various sources. This is coupled with the obligation to discuss and adopt the financial provisions necessary for the functioning and implementation of the Agreement set out in article 15.4. Additionally, the functioning of the voluntary fund stipulated in article 14 shall be defined by the Conference of the Parties. Article 14.3 further elaborates that the Conference may seek to obtain funds from other sources to support the implementation of the Agreement.

The Conference of the Parties will also play a fundamental role in any possible modification of the Agreement that may be adopted in the future. These modifications may be made through the adoption of an autonomous protocol[88] which complements the treaty or through the adoption of an amendment[89] to the text of the Agreement itself. Any protocol that may be envisaged shall be prepared and adopted by the Conference of the Parties. The procedure established under article 20 on amendments provides for the examination and adoption of proposals by this body.

Another aspect to highlight is the decision-making process of the Conference of the Parties, which includes, as a general rule, all issues related to the registration of the agenda items of the meeting, the procedure for the submission of proposals to be discussed and adopted and the rules governing the vote. Although this decision-making process shall be established in its rules of procedure pursuant to article 15.4(a), the Agreement sets certain binding rules and mandates that shall be respected by the Conference of the Parties. First, the obligation to discuss and adopt at its first meeting some items indicated under articles 15.4[90] and

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[88] In the context of treaty law and practice, a protocol is normally considered a treaty. The Escazú Agreement follows this understanding by requiring such protocols to be subsequently signed, ratified, accepted, approved or adhered to. In general terms, a protocol supplements or further develops a multilateral treaty. One of its advantages is that, while linked to the parent agreement, it may focus on a specific aspect in greater detail, e.g. the Economic Commission for Europe (UNECE) Protocol on Pollutant Release and Transfer Registers.

[89] Under the Law of the Treaties, a treaty may be amended if States parties so agree. The amendment is usually adopted as a new treaty with the purpose of modifying the text of the original treaty. In the case of a multilateral treaty, the procedure for negotiation, adoption, signature, ratification, accession, approval or adhesion and entry into force is usually established by the original treaty. In the Escazú Agreement this procedure is contained in article 20.

[90] The rules of procedure of the Conference of the Parties (including the modalities for significant participation by the public), and the financial provisions necessary for the functioning and implementation of the Agreement.

18.1;[91] second, the "one party, one vote" rule included in article 16 and finally, the need to reach certain decisions by consensus or by a specific majority.

The rules of the Agreement related to voting are especially important. In this regard, consensus[92] is required for the adoption of its rules of procedure, financial provisions and the establishment of subsidiary bodies (article 15, paragraphs 4 and 5(a)). In the examination and adoption of amendment proposals, all efforts shall be made to reach consensus, but should that not be possible, a decision may be reached by a three-fourths majority vote of the parties present and voting at the meeting (article 20.3). The Escazú Agreement does not establish any specific majority for the adoption of the other decisions. This majority should be included in the rules of procedure of the Conference of the Parties to be adopted at its first meeting.

D. Article 16 – Right to vote

Each Party to the present Agreement shall have one vote.

Article 16 refers to a well-established rule of international law, whereby each party is granted one vote. This provision grants equal footing and status to all parties and the same right to participate in the decision-making process, regardless of the voting majorities required or decision-making rules that may be applicable in a given situation or context.

The "one country, one vote" rule derives from the principle of sovereign equality of States rooted in the Charter of the United Nations (article. 2.1) and applicable to United Nations principal bodies such as the General Assembly and the Economic and Social Council. Sovereign equality is also included expressly as one of the principles of the Escazú Agreement in its article 3(j).

E. Article 17 – Secretariat

17.1 The Executive Secretary of the Economic Commission for Latin America and the Caribbean shall carry out the secretariat functions of the present Agreement.
17.2 The functions of the Secretariat shall be as follows: (a) to convene and organize the meetings of the Conference of the Parties and its subsidiary bodies and provide the necessary services; (b) to provide assistance to the Parties upon their request for capacity-building, including the sharing of experiences and information and the organization of activities in accordance with articles 10, 11 and 12 of the present Agreement; (c) to determine, under the general guidance of the Conference of the Parties, the administrative and contractual arrangements needed to carry out its functions effectively; and (d) to perform any other secretariat functions specified in the present Agreement and any other functions as determined by the Conference of the Parties.

[91] The rules governing the structure and functioning of the Committee to Support Implementation and Compliance.

[92] Consensus may be defined as a mode of adoption of decisions, resolutions, or recommendations without voting. A decision is adopted by consensus if, after submission of a proposal, no formal explicit objection is made by States or no State requests a vote. See United Nations Environment Programme (UNEP), *Glossary of Terms for Negotiators of Multilateral Environmental Agreements*, Nairobi, 2007.

The most recent multilateral treaties establishing an institutional framework to facilitate cooperation between State parties designate a secretariat, which is responsible for the regular operation of the treaty and for offering support to the Conference of the Parties and other bodies.

In the case of the Escazú Agreement, this function is entrusted to the Executive Secretary of ECLAC. Within ECLAC, the functions of the secretariat are discharged by the Sustainable Development and Human Settlements Division.

The contact details of the secretariat are as follows:

Secretariat of the Escazú Agreement
Sustainable Development and Human Settlements Division
Economic Commission for Latin America and the Caribbean
Santiago, Chile
Email: secretaria.escazu@cepal.org
Web: http://www.cepal.org/en/escazuagreement

Article 17 refers to four main functions of the secretariat of the Escazú Agreement, common to most multilateral environmental agreement secretariats:

1. Service meetings.
2. Provide assistance to parties.
3. Determine administrative and contractual arrangements.
4. Perform other functions.

The first function refers to the servicing of meetings of the bodies of the Agreement, including the Conference of the Parties and subsidiary bodies. The secretariat's role encompasses both convening and organizing the meetings and the provision of the necessary services.

In addition, the secretariat is tasked with providing assistance to parties upon request for capacity-building. Particular reference is made to articles 10, 11 and 12 of the Agreement, which are related to capacity-building, cooperation and the clearing house. Article 12 expressly states that the clearing house shall be operated by ECLAC, in its capacity as secretariat.

Other functions relate to the determination of administrative and contractual arrangements needed to perform functions as well as any other function specified by the Conference of the Parties.

F. Article 18 – Committee to Support Implementation and Compliance

18.1 A Committee to Support Implementation and Compliance is hereby established as a subsidiary body of the Conference of the Parties to promote the implementation of the present Agreement and to support the Parties in that regard. The rules relating to its structure and functions shall be determined by the Conference of the Parties at its first meeting.

18.2. The Committee shall be of a consultative and transparent nature, non-adversarial, non-judicial and non-punitive and shall review compliance of the provisions of the present Agreement and formulate recommendations, in accordance with the rules of procedure established by the Conference of the Parties, ensuring the significant participation of the public and paying particular attention to the national capacities and circumstances of the Parties.

Article 18 establishes the Committee to Support Implementation and Compliance as a subsidiary body of the Conference of the Parties. The establishment of this type of body, normally composed of independent experts, is common in multilateral environmental agreements[93] and human rights treaties to oversee implementation and review compliance by parties.

The Agreement outline a double function for this committee. On the one hand, it is intended to support implementation of the provisions of the Agreement. On the other hand, it is also a body that reviews compliance and formulates recommendations. The provision clearly sets out its character: consultative, transparent, non-adversarial, non-judicial and non-punitive. This means that the Committee's focus is on cooperation and constructive collaboration, dialogue and assistance, helping countries to identify gaps and barriers in implementation and to overcome them.

The rules relating to the Committee's structure and functions are to be determined by the Conference of the Parties at its first meeting. However, the Agreement already defines two criteria that must guide its functioning:

1. The significant participation of the public.
2. The consideration of national capacities and circumstances of the parties.

The significant participation of the public in its functioning is inherent in the Agreement, both in terms of its content and its negotiation process. By recognizing the rights of the public and having been drafted with the significant participation of the public, it can only follow that its implementation and compliance procedures also place the public at its core. The significant participation of the public is likewise recognized in article 15.4(a) in reference to the rules of procedure of the Conference of the Parties.

For its part, the consideration of the national capacities and circumstances of the parties in its review of compliance and formulation of recommendations is also an essential criterion. This means that compliance must take into account the context and situation of each party to effectively measure and assess the respect of the treaty obligations.

[93] For example, the Paris Agreement establishes in its article 15.2 a committee to facilitate implementation and promote compliance. The same model is followed by the Minamata Convention, which in its article 15 provides for an implementation and compliance committee. In turn, the Aarhus Convention opted for a compliance committee, established pursuant to its article 15 in decision I/7 of its Meeting of the Parties.

IX. Final provisions and annex 1

In a treaty, the articles that follow the substantive and institutional articles are usually called the final provisions. Despite their nomenclature and the fact that they are mostly procedural, their importance should not be underestimated. These provisions cover a wide range of issues essential to the functioning of a treaty. They normally establish the procedures whereby States express their consent to be bound by the treaty and the requirements for its entry into force, identify the language for the authentic text and the depositary, define the rules applicable to reservations and amendments of the treaty and establish the means for dispute settlement.

The final provisions of the Escazú Agreement are included in articles 19–26, which follow international practice and are very similar to those of other multilateral environmental agreements.

From a technical point of view, the legal effect of some final provisions is also relevant as they establish some procedures without which the entry into force of the treaty could not take place. Thus, by their very nature and objective, some provisions are immediately applicable after a treaty is adopted, even before it enters into force.[94] In the Escazú Agreement for example, this was the case of the opening for signature and the period to sign, the modalities for expressing the consent to be bound (ratification, acceptance or approval and accession), the rules on entry into force, the authentic texts, the designation and role of the depositary and the prohibition of reservations, which applied before entry into force. Likewise, annex 1 containing the list of countries of Latin America and the Caribbean entitled to become parties of the Agreement was immediately applicable after the adoption of the treaty.

On the contrary, other final provisions are subject to the general rule on applicability. This is the case of the articles related to the settlement of disputes (article 19), amendments (article 20) and withdrawal (article 24). These provisions are only applicable after the entry into force of the Escazú Agreement.

In any case, this is no longer relevant as all final provisions and annex 1 have been fully applicable since 22 April 2021 owing to the treaty's entry into force.

Table IX.1 provides an overview of the main obligations contained in articles 19–26 and practical guidance for their implementation.

[94] See article 24.4 of the Vienna Convention on the Law of Treaties.

Table IX.1
Main obligations contained in articles 19–26 of the Escazú Agreement and implementation guidance

Article 19		
Provision	**Obligation**	**Implementation guidance**
Paragraph 1	If a dispute arises, seek a solution by negotiation or any other means acceptable	- Disputes between two or more parties about the interpretation or application of the Agreement - Mutual agreement between parties is required
Paragraph 2	When a dispute remains unsolved, a party may declare acceptance of one or both of the following means: submission to the International Court of Justice or arbitration	- Must be expressed in writing by a party when expressing its consent to be bound
Paragraph 3	If both means of dispute settlement in paragraph 2 have been accepted, the dispute may be submitted only to the International Court of Justice unless agreed otherwise	- Requires acceptance of both means of paragraph 2 by all parties to the dispute - Parties may agree otherwise
Article 20		
Provision	**Obligation**	**Implementation guidance**
Paragraph 1	May propose amendments	- Any party may propose amendments to the Agreement
Paragraph 2	Conference of the Parties shall adopt amendments	- The text of the proposed amendment shall be communicated to parties at least six months before the meeting - Signatories and the depositary shall also be informed
Paragraph 3	Every effort shall be made to reach consensus	- If efforts to reach consensus fail, as a last resort, the amendment shall be adopted by a three-fourths majority vote of the parties present and voting
Paragraph 4	Adopted amendments shall be communicated to all parties	- Must be communicated by the depositary - Amendments require ratification, acceptance or approval by each party
Paragraph 5	Adopted amendments shall enter into force on the ninetieth day after the date of deposit of the instruments of ratification, acceptance or approval by at least half of the number of parties to the Agreement at the time the amendment was adopted	- The depositary must be informed of ratification, acceptance or approval of an amendment - An amendment shall only bind those parties having consented to be bound by it - For other parties, it shall enter into force on the ninetieth day after the date of deposit of the respective instrument
Article 21		
Provision	**Obligation**	**Implementation guidance**
Paragraph 1	Opening for signature	- The Agreement was open for signature from 27 September 2018 to 26 September 2020 at United Nations Headquarters in New York
Paragraph 2	Subject to ratification by signatory countries and accession by non-signatory countries	- Limited to countries listed in annex 1 - Instruments to be deposited with the depositary

Article 22		
Provision	**Obligation**	**Implementation guidance**
Paragraph 1	Entry into force	- On the ninetieth day after the date of deposit of the eleventh instrument of ratification, acceptance, approval or accession
Paragraph 2	Entry into force for parties after the deposit of the eleventh instrument of ratification, acceptance, approval or accession	- On the ninetieth day after the date of deposit of the respective instrument
Article 23		
Obligation		**Implementation guidance**
No reservations may be made		- In line with treaty law and practice in environmental matters
Article 24		
Provision	**Obligation**	**Implementation guidance**
Paragraph 1	Any party may withdraw from the Agreement	- At any time after three years from entry into force - Written notification to the depositary is required
Paragraph 2	Effectiveness of the withdrawal	- One year from the date of receipt by the depositary of the notification of withdrawal or on a later date if so specified
Article 25		
Obligation		**Implementation guidance**
Designates the depositary		- The Secretary-General of the United Nations shall serve as the depositary
Article 26		
Obligation		**Implementation guidance**
Establishes authentic texts		- The English and Spanish versions are equally authentic

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of the Escazú Agreement.

A. Article 19 – Settlement of disputes

1. If a dispute arises between two or more Parties about the interpretation or application of the present Agreement, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.
2. When signing, ratifying, accepting, approving or acceding to the present Agreement, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of the present article, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation: (a) submission of the dispute to the International Court of Justice, (b) arbitration in accordance with the procedures that the Conference of the Parties will establish.
3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 of the present article, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

Article 19 stipulates the means of settlement of disputes that may arise among parties about the interpretation or application of the Escazú Agreement. This procedure is only applicable between State parties and not between parties and members of the public or other stakeholders.

The means provided in this article are common in international law[95] and follow standard procedures similar to those included in most multilateral environmental agreements, such as the Minamata Convention on Mercury[96] or the United Nations Framework Convention on Climate Change.[97] The Escazú Agreement offers a wide variety of voluntary options and a high degree of flexibility to parties as to the means they may choose to solve any possible disputes peacefully.

When a dispute arises, parties are first called on to seek a solution through negotiation or by any other means of dispute settlement that may be acceptable to them. As a result, the article expressly provides for an informal, non-confrontational and non-compulsory method as a preferred means of dispute settlement, while also allowing agreement on a different means acceptable to the parties concerned. These other means are not listed in the Agreement, leaving it to the absolute discretion of the parties. By way of example these may constitute consultation, mediation, conciliation, good offices or panel procedures, fact-finding or any other means for the peaceful settlement of disputes referred to in article 33 of the Charter of the United Nations. This provision therefore grants great flexibility and control to the parties, as it allows them to solve the controversy through non-formal means or agree on a suitable means that is acceptable to both parties to the dispute.

In addition, article 19.2 of the Agreement gives the alternative to parties of voluntarily accepting two other means of dispute settlement: submission of the dispute to the International Court of Justice or arbitration. These alternative means may only be applied if the dispute is not settled through negotiation or another agreed means as provided for in article 19.1.

Recourse to any of these means is not compulsory and under no circumstance may a party be forced to opt for one of them unless it has expressly consented to it. As a result, a dispute shall only be submitted to the International Court of Justice or to arbitration if each party has expressly agreed to use either one or both means. In case both parties have accepted both means, preference is given to the International Court of Justice, unless the parties agree otherwise. Here again, mutual agreement between the parties is the overriding rule. The article indicates that a party may unilaterally accept either means of dispute settlement through a declaration sent to the depositary in writing at the time of signature, ratification, acceptance, approval or accession or at any time thereafter.

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[95] See article 33 of the Charter of the United Nations and United Nations, “Manila Declaration on the Peaceful Settlement of Disputes” (A/RES/37/10), Manila, 1982.

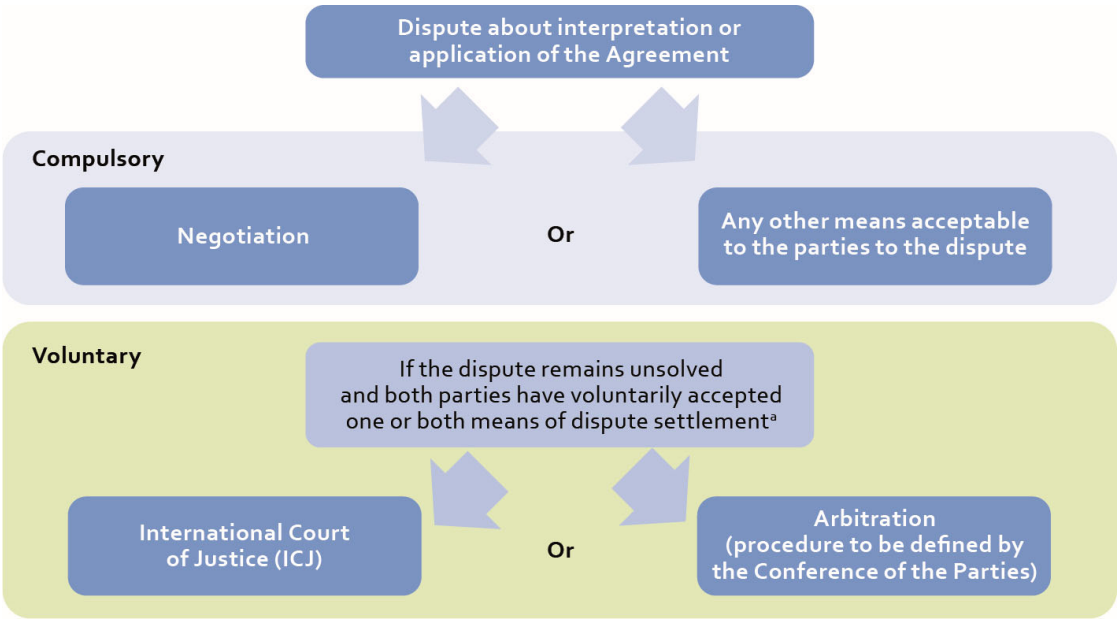
[96] See article 25.

[97] See article 14.

The jurisdiction and procedures of the International Court of Justice are governed by the Charter of the United Nations and the Statute of the International Court of Justice. In the case of arbitration, the Agreement states that these procedures shall be established by the Conference of the Parties.

The procedure under article 19 is summarized in diagram IX.1.

Diagram IX.1
Procedure under article 19



Source: Economic Commission for Latin America and the Caribbean (ECLAC).
[a] When both parties have accepted both means, submission to ICJ prevails unless agreed otherwise by the parties.

B. Article 20 – Amendments

20.1 Amendments to the present Agreement may be proposed by any Party.
20.2 Amendments to the present Agreement shall be adopted at a meeting of the Conference of the Parties. The text of any proposed amendment shall be communicated to the Parties by the Secretariat at least six months before the meeting at which it is proposed for adoption. The Secretariat shall also communicate the proposed amendment to the signatories to the present Agreement and, for information, to the Depositary.

20.3 The Parties shall make every effort to reach a consensus on any proposed amendment to the present Agreement. In the event that the efforts to reach a consensus fail, as a last resort, the amendment shall be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.
20.4 An adopted amendment shall be communicated by the Depositary to all Parties for ratification, acceptance or approval.
20.5 Ratification, acceptance or approval of an amendment shall be notified to the Depositary in writing. An amendment adopted in accordance with paragraph 3 of the present article shall enter into force for the Parties having consented to be bound by it on the ninetieth day after the date of deposit of the instruments of ratification, acceptance or approval by at least half of the number of Parties to the present Agreement at the time the amendment was adopted. Thereafter, the amendment shall enter into force for any other Party that consents to be bound by it on the ninetieth day after the date of deposit of its instrument of ratification, acceptance or approval of the amendment.

The Escazú Agreement establishes a specific mechanism for amendments in its article 20. An amendment includes any alteration of the treaty provisions, including revisions, modifications, additions or suppressions.

The amendment procedure usually follows a five-stage process:

1. Proposal of amendments
2. Circulation of proposals of amendments
3. Adoption of amendments
4. Parties' consent to be bound by amendments
5. Entry into force of amendments

The first three paragraphs of article 20 indicate who may propose the amendments and how these proposals are to be examined and adopted, whereas the fourth and fifth paragraphs refer to the communication of an adopted amendment, parties' consent to be bound and the entry into force of the amendments.

Article 20.1 establishes that any party may propose an amendment. The Agreement does not specify the specific format or to whom the party may make such a proposal, but stipulates that it shall be communicated to the parties, signatories and the depositary by the secretariat and examined and adopted by the Conference of the Parties (article 20.2 and article 15.5(f)). This communication shall take place at least six months before the meeting of the Conference of the Parties at which it is proposed for adoption.

Article 20.3 outlines consensus as the preferred means of adoption of an amendment. However, if all efforts to reach consensus are unsuccessful, as a last resort, an amendment may be adopted by a three-fourths majority vote of the parties present and voting at the meeting, offering a balance between flexibility and stability of the treaty. Any adopted amendment shall then be communicated by the depositary to all parties.

As with the original text of the Escazú Agreement, to be bound by a new amendment parties shall accept, ratify or approve that amendment and accordingly so notify the depositary in writing. Acceptance, ratification or approval of the amendment by each State party of the Agreement is governed by rules of international treaty law.[98]

[98] See articles 7, 11, 14 and 15 of the Vienna Convention on the Law of Treaties.

To enter into force, the Agreement requires the deposit of the instruments of ratification, acceptance or approval of at least half of the number of parties to the Agreement at the time the amendment was adopted. This amendment shall only enter into force for the parties that have consented to be bound by it on the ninetieth day after the date of deposit by at least half of the number of parties to the Agreement at the time the amendment was adopted. Thereafter, it shall enter into force for any other party that consents to be bound by the amendment on the ninetieth day after the deposit of its instrument of ratification, acceptance or approval of that amendment.

It is clear that every party is entitled to participate in the negotiations of an amendment and may become a party to the new amendment. However, though preference is given to consensus, not all parties are required to adopt amendments and, even if adopted, these require a subsequent step for them to be binding for each party: the ratification, acceptance or approval of each party together with a critical mass of at least half of the parties at the moment of adoption in order for the amendment to enter into force.

Once an amendment has entered into force, the question then arises as to the effects of this amendment on parties. As analysed above, the Escazú Agreement clearly stipulates that an amendment will bind only those States that have formally accepted it. As a result, any pre-amended terms of the Agreement remain binding for any party that does not accept the amendment.[99]

C. Article 21 – Signature, ratification, acceptance, approval and accession

21.1 The present Agreement shall be open for signature by any of the countries of Latin America and the Caribbean included in annex 1 at United Nations Headquarters in New York from 27 September 2018 to 26 September 2020.
21.2 The present Agreement shall be subject to the ratification, acceptance or approval of the States that have signed it. It shall be open to accession by any country in Latin America and the Caribbean included in annex 1 that has not signed it from the day after the date on which it is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary

Article 21 specifies the process for a State to participate in the Escazú Agreement, thereby assuming the rights and obligations enshrined in the treaty. It follows the traditional pattern of multilateral treaties, making a distinction between two different kinds of acts: signature, on one hand, and ratification, acceptance, approval and accession, on the other. Signature is the instrument of authentication of the treaty. Ratification, acceptance, approval and accession are the means to express the State's consent to be bound by the treaty. The distinction between these categories of acts is expressed in paragraphs 1 and 2 of article 21.

[99] See part IV of the Vienna Convention on the Law of Treaties.

1. Signature

Signature is not a valid expression of the consent of a State to become a party to the Escazú Agreement, but an instrument of authentication of the treaty as established in article 10 of the Vienna Convention on the Law of Treaties. By signing the Escazú Agreement, States declare that the text of the Agreement has been established as authentic and definitive. However, through signature, the States included in annex 1 of the Agreement express their interest in the treaty. A signatory country has the right to become a party to the treaty that it has signed and there is an expectation that they shall initiate internal procedures to ratify, accept or approve the Agreement.

As signature does not express the consent to be bound by the treaty, signatory countries are not yet legally bound by the Escazú Agreement. However, signature creates certain legal effects for a State. A signatory country has the obligation to refrain from acts that would defeat the object and purpose of the treaty in accordance with article 18 of the Vienna Convention on the Law of Treaties. The object and purpose of the Escazú Agreement are set out, among others, in article 1 and the preamble.

The Escazú Agreement provides for a regional scope of application as well as a place of signature, a date of opening for signature and a period during which signatures may be affixed. Pursuant to article 21.1, the Agreement was open to the signature of all countries of Latin America and the Caribbean included in annex 1 between 27 September 2018 and 26 September 2020. At the time of the closing of the period for signature, a total of 24 countries had signed the agreement.

2. Ratification, acceptance and approval

To formally become a party to the Agreement, a State must express through a concrete act its consent to be bound by the treaty and agree to undertake the legal rights and obligations contained therein. For the countries that had signed the Escazú Agreement by 26 September 2020, this consent to be bound is expressed through ratification, acceptance and approval. Unlike signature, which could only take place during a specific period, there is no time limit to ratify, accept or approve the Agreement.

When a State wishes to ratify, accept or approve a treaty, it must issue an instrument of ratification, acceptance or approval signed by the Head of State, Head of Government or Minister for Foreign Affairs or any other person having received full powers for that purpose. The instrument must be communicated to the Secretary-General of the United Nations in his capacity as depositary. States are advised to deliver these instruments to the Treaty Section of the United Nations Office of Legal Affairs directly to ensure the action is promptly processed. Although the instrument must be signed by the competent authorities mentioned above, the individual who delivers the instrument of ratification does not require full powers.

By providing for signature subject to ratification, acceptance or approval, the Escazú Agreement follows common international practice. This two-stage process allows States sufficient time to seek approval for the treaty at the domestic level and to enact any necessary legislation to implement it domestically before undertaking legal obligations at the international level, in case domestic law so requires.

Box IX.1 contains practical information on the instruments of ratification, acceptance or approval.

Box IX.1
Form of instrument of ratification, acceptance or approval

An instrument of ratification, acceptance or approval must be signed by one of three competent authorities (Head of State, Head of Government or Minister for Foreign Affairs).

There is no mandated form for the instrument, but it must include the following:

- Title, date and place of conclusion of the treaty (e.g. Escazú, Costa Rica, 4 March 2018).
- Full name and title of the person signing the instrument, i.e., the Head of State, Head of Government or Minister for Foreign Affairs or any other person acting in such a position for the time being or with full powers for that purpose issued by one of the above authorities.
- An unambiguous expression of the intent of the government, on behalf of the State, to consider itself bound by the treaty and to undertake faithfully to observe and implement its provisions.
- Date and place where the instrument was issued.
- Signature of the Head of State, Head of Government or Minister for Foreign Affairs (the official seal is not adequate) or any other person acting in such a position for the time being or with full powers for that purpose issued by one of the above authorities.

Source: United Nations, *Treaty Handbook*, New York, 2006.

Ratification, acceptance or approval at the international level must not be confused with the internal procedures that a State may be required to undertake according to its national law. These internal processes may also be called “ratification” or “approval” and are often entrusted to legislative or executive bodies and, depending on the country, may require the involvement of the judiciary. Even if all internal processes for ratification, acceptance or approval have been completed, to be effective internationally, the State is required to deposit the corresponding instrument with the Secretary-General of the United Nations at the United Nations Headquarters in New York.

Acceptance or approval of a treaty following signature has the same legal effect as ratification and the same rules apply.

3. Accession

After the period for signature (26 September 2020), a State that has not signed the Agreement may become a party by expressing its consent to be bound through an instrument of accession. Accession has the same legal effect as ratification, acceptance or approval. However, unlike ratification, acceptance or approval, which are preceded by signature to create binding legal obligations under international law, accession requires only one step, namely, the deposit of an instrument of accession.

The Secretary-General, as depositary, treats instruments of ratification that have not been preceded by signature as instruments of accession, and the States concerned are advised accordingly.

The same requirements for the instrument of ratification, acceptance or approval apply to instruments of accession (see box IX.1). As with instruments of ratification, acceptance and approval, instruments of accession become effective only when they have been deposited with the Secretary-General of the United Nations at the United Nations Headquarters in New York.

D. Article 22 – Entry into force

22.1 The present Agreement shall enter into force on the ninetieth day after the date of deposit of the eleventh instrument of ratification, acceptance, approval or accession.
22.2 For each State that ratifies, accepts or approves the present Agreement or accedes thereto after the deposit of the eleventh instrument of ratification, acceptance, approval or accession, the present Agreement shall enter into effect on the ninetieth day after the date of deposit by such State of its instrument of ratification, acceptance, approval or accession.

For a treaty to become binding under international law, the necessary conditions for its entry into force must be met. Typically, treaties determine certain conditions for this, such as a specific date or a number of States that have deposited instruments of ratification, approval, acceptance or accession.

To enter into force, the Escazú Agreement required 11 countries to consent to be bound by it. That threshold was achieved on 22 January 2021. Thus the treaty took effect for those countries that had become parties on the ninetieth day after the date of deposit of the eleventh instrument, which was 22 April 2021, International Mother Earth Day. For each additional party thereafter, the Agreement will become binding for that party on the ninetieth day after the date of deposit of its respective instrument.

Although the Agreement generally entered into force on 22 April 2021, it will only create legal effects for each party from the moment it enters into force for that party onwards. In other words, since 22 April 2021 the Escazú Agreement has been in force for the States which ratified it on or before 22 January 2021. However, it does not enter into force for any other State until that State has ratified, accepted, approved or acceded to it and deposited its instrument with the Secretary-General.

The Agreement is not retroactive,[100] meaning that its provisions do not bind a party with respect to a fact or act that took place or any situation that ceased to exist before the date of the entry into force of the treaty.[101]

The 11 instruments required represented one third (or 33%) of the total universe of possible parties at the moment of adoption (33 countries). Although the threshold required by the Escazú Agreement is proportionally higher than that required in other multilateral environmental agreements,[102] this ensured that a significant critical and representative mass of countries in the region was achieved before the treaty entered into force.

E. Article 23 – Reservations

No reservations may be made to the present Agreement.

The Vienna Convention on the Law of Treaties defines a reservation as a unilateral statement, however phrased or named, made by a State whereby it purports to exclude or alter the legal effect of certain

[100] Article 28 of the Vienna Convention on the Law of Treaties.

[101] The treaty may, however, apply to a previous situation, fact or action that continues after entry into force.

[102] For example, the Minamata Convention, the Stockholm Convention, the Rotterdam Convention, the United Nations Framework Convention on Climate Change or the Convention to Combat Desertification required 50 out of a universe of 193 countries (i.e. 26% of possible parties), whereas the Convention on Biological Diversity required 30 and the Basel Convention and the Vienna Convention on the Law of Treaties required 20 parties, representing around 15% and 10% of their possible membership respectively.

provisions of a treaty in their application to that State. Treaties may allow reservations, provide for specified reservations or prohibit them completely. Even when permitted expressly in a treaty, reservations cannot be contrary to the object and purpose of that treaty.[103]

The total prohibition of reservations has been the standard practice in international environmental law for the past 30 years. None of the main multilateral environmental agreements adopted since 1985 allow any reservation, such as the three Rio conventions, the chemicals conventions or the Paris Agreement, to name a few. See box IX.2 for additional examples. This prohibition is intended to protect the integrity of the treaty and support its implementation and effectiveness.

Box IX.2
Multilateral environmental agreements that expressly prohibit all reservations

- Paris Agreement, 2015 (article 27)
- Minamata Convention on Mercury, 2013 (article 32)
- Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2010 (article 34)
- Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, 2010 (article 19)
- International Treaty on Plant Genetic Resources for Food and Agriculture, 2001 (article 30)
- Stockholm Convention on Persistent Organic Pollutants, 2001 (article 27)
- Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000 (article 38)
- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998 (article 27)
- Kyoto Protocol, 1997 (article 26)
- United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994 (article 37)
- Convention on Biological Diversity, 1992 (article 37)
- United Nations Framework Convention on Climate Change, 1992 (article 24)
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989 (article 26)
- Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 (article 18)
- Vienna Convention for the Protection of the Ozone Layer, 1985 (article 18)

Source: Economic Commission for Latin America and the Caribbean (ECLAC).

Following this trend, article 23 does not permit any reservation to be made to the Escazú Agreement. As a result, when joining the treaty, States accept the text in its entirety. In addition to being consistent with the aforementioned practice in international environmental law, this express prohibition is rooted in the fact that during the negotiations all provisions were negotiated by consensus, in an open, transparent and participatory manner, the result of which was a carefully crafted and finely balanced text that considered all interests and concerns expressed and was deemed acceptable to all negotiating countries as a one-package deal. The text also reflects a series of interlocking compromises and accommodates the different realities and contexts of each country under common agreeable goals and standards.

[103] See part II, section 2 of the Vienna Convention on the Law of Treaties.

When reservations are totally prohibited as in the case of the Escazú Agreement, determining whether a given unilateral statement made by a State when expressing its consent to be bound constitutes a reservation or not may become a complex matter, and even result in objections from other States amounting to a dispute. Where a treaty prohibits reservations, it is the practice of the Secretary-General of the United Nations, as depositary, to make a preliminary legal assessment as to whether a given statement constitutes a reservation. If the statement has no bearing on the State's legal obligations, the Secretary-General circulates the statement. If the statement prima facie unambiguously excludes or modifies the legal effects of the provisions of a treaty, the Secretary-General shall draw the attention of the State concerned to the issue and may also seek clarification on the real nature of the statement. If it is formally clarified that the statement is not a reservation, the instrument shall be deposited and notified to all States concerned, but the statement may not be relied upon as a reservation later.[104]

F. Article 24 – Withdrawal

24.1. At any time after three years from the date on which the present Agreement has entered into force for a Party, that Party may withdraw from the present Agreement by giving written notification to the Depositary.
24.2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.

The Escazú Agreement does not establish any specific period of duration. Thus, the legal regime derived from it is considered indefinite. However, article 24 provides for the withdrawal of a party from the Escazú Agreement. This provision is common in treaty law, allowing a party to unilaterally terminate its legal engagements under the treaty subject to certain requirements and conditions. The withdrawal of a given party is independent of the existence of the treaty, which continues to produce effects for the other parties that remain bound by it.

According to this provision, a party wishing to withdraw from the Escazú Agreement may only do so after three years from the date on which it entered into force for that party. Written notice shall be given to the depositary and the withdrawal will only become effective after one year from the date of receipt by the depositary of that notification, or on such later date as may be specified in the notification.

G. Article 25 – Depositary

The Secretary-General of the United Nations shall be the Depositary for the present Agreement.

The depositary of a treaty is entrusted with the custody of that treaty and performs important functions, such as ensuring the proper execution of all corresponding treaty actions.[105] These include keeping custody of the original text of the treaty, preparing certified copies, receiving signatures and instruments of ratification, acceptance, approval or accession and informing of acts, notifications and communications

[104] See United Nations, *Final Clauses of Multilateral Treaties Handbook*, New York, 2003.
[105] See articles 76–80 of the Vienna Convention on the Law of Treaties.

relating to the treaty. The depositary performs international duties and is under an obligation to act impartially in the performance of those duties.

Like many other treaties, the Escazú Agreement designates as its depositary the Secretary-General of the United Nations in its article 25. Other articles in the Agreement also assign important functions to the depositary, such as:

1. Receipt of statements regarding settlement of disputes (article 19).
2. Communication of proposed and adopted amendments, and receipt of notifications regarding ratification, acceptance or approval of amendments (article 20).
3. Receipt of instruments of ratification, acceptance, approval and accession (article 21).
4. Receipt of notifications of withdrawal (article 24),
5. Custody of the authentic texts of the Agreement (article 26).

The functions of the Secretary-General of the United Nations as depositary are discharged by the Treaty Section of the Office of Legal Affairs based in New York. The contact details of the Treaty Section are as follows:

Treaty Section
Office of Legal Affairs
United Nations
New York, NY 10017
United States of America
Telephone: +1 212 963 5047
Email: treatysection@un.org
Website: http://treaties.un.org

H. Article 26 – Authentic texts

The original of the present Agreement, the Spanish and English texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

The process of establishing the final or definitive text of a treaty is formally known as “authentication”. As with most multilateral treaties, the Escazú Agreement was concluded in more than one language. Article 26 indicates that the languages of the authentic texts are exclusively Spanish and English. Both are equally authentic, meaning they are equally authoritative and the terms in both languages are presumed to have the same meaning and value.[106]

Although the certified true copies of the Escazú Agreement are only in Spanish and English, in an effort to support wider outreach and engagement, the secretariat has facilitated non-authentic translations into other languages. These are for information purposes only and are not intended to replace the authentic texts. Currently, non-authentic versions of the Escazú Agreement are available in French, Portuguese and Quechua,[107]

[106] See article 33 of the Vienna Convention on the Law of Treaties.
[107] The unofficial translations of the Escazú Agreement are available [online] http://www.cepal.org/en/escazuagreement.

I. Annex 1

– Antigua and Barbuda
– Argentina
– Bahamas
– Barbados
– Belize
– Bolivia (Plurinational State of)
– Brazil
– Chile
– Colombia
– Costa Rica
– Cuba
– Dominica
– Dominican Republic
– Ecuador
– El Salvador
– Grenada
– Guatemala
– Guyana
– Haiti
– Honduras
– Jamaica
– Mexico
– Nicaragua
– Panama
– Paraguay
– Peru
– Saint Kitts and Nevis
– Saint Lucia
– Saint Vincent and the Grenadines
– Suriname
– Trinidad and Tobago
– Uruguay
– Venezuela (Bolivarian Republic of)

The Agreement has one annex, which contains the list of the 33 countries of Latin America and the Caribbean in existence at the time of adoption and to which the Agreement is open, pursuant to article 21. As a result, any of these 33 countries may sign, ratify, accept, approve or accede to the treaty as per the article.

This list is intended to emphasize the regional scope of the Agreement already set out in its objective (article 1),[108] and to clearly define the meaning of "Latin America and the Caribbean", delimiting the treaty's possible membership and composition.

The annex is an integral part of the Agreement and is binding.

[108] The term "Latin America and the Caribbean" is also found in article 11.2 of the Escazú Agreement.