

Rights of Access to Environmental Information and the Escazú Regional Agreement

An interview with Joara Marchezini, Master in International Humanitarian Action and Project Coordinator of Nupef Institute.

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The CGU magazine concludes its 10-year commemorative dossier of LAI in Brazil presenting the interview with Joara Marchezini, Master in International Humanitarian Action from the University of Deusto, Spain, and Project Coordinator at Nupef Institute. Joara was project officer in the department of access to information of the Article 19 non-governmental organization for 7 years, playing an active role in the negotiations of the Escazú agreement.

The choice of our interviewee, as well as her main field of activity, is connected to one of the dearest objectives of this dossier, which is to understand access to information not only in a broad sense, but also in the implications of access to information in other subsystems of public policy. More than that, it also represents the vision of a stakeholder that is different from the academia, which is so important in the construction of the full exercise of the right to information; This right includes the search for the freedom necessary for the production, dissemination and access to scientific information applicable to the various fields of Public Policy.

Scientific communication in the form of interviews allows greater flexibility and protects the due rigor so thoroughly imposed on scientific production and dissemination, which requires the constant balance between rigid methods and the urgency for answers to meet the demands of society.

The theme is aligned with key issues in today's different societies related to the protection of the environment and the promotion of human rights, including the right to information, social participation and access to justice. It also addresses the interdependence between different rights and the needs for coordination between public policies. On the one hand, the theme is connected to the assumption that environmental protection and sustainable development depend on right to information policies, and, on the other, that these policies are only justified when they provide access to information related to an important dimension, as in the case of environmental information.

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1) **Temístocles Murilo de Oliveira Júnior and Karina Furtado Rodrigues:**

Joara, thank you for accepting our invitation to participate in this interview on the right to environmental information and the Escazú Agreement (ECLAC, 2018). We would like to start by asking about the context of the origin of the agreement: how were the negotiation meetings, principles and findings that underlie it built? Which were the main intergovernmental, governmental, non-governmental and academia actors that drove the negotiations and helped draft it until it was signed in 2018?

Joara Marchezini: *The Escazú Agreement originates from Principle 10 of the United Nations Conference on Environment and Development (UNCED), in Rio de Janeiro, 1992 (known as ECO-92) (UNITED NATIONS, 1992). Principle 10 is one of the 27 principles of this declaration and states 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.*

During the United Nations Conference on Sustainable Development (also known as Rio+20), held in 2012 (UNITED NATIONS, 2012), ten countries signed the document “Declaration on the implementation of principle 10”, formalizing the commitment to discuss a regional agreement on the topic. At that time, the countries were Chile, Costa Rica, Ecuador, Jamaica, Mexico, Panama, Paraguay, Peru, Dominican Republic and Uruguay.

Between 2012 and 2014, more countries joined the process and four face-to-face meetings were held with representatives of governments and members of civil society, with support from the Economic Commission for Latin America and the Caribbean (ECLAC). This period was crucial for research and analysis of legislation on information access, participation and access to justice in Latin America and the Caribbean, which served as the basis for the text and negotiation procedures.

Formally, negotiations began in 2014 and ended in February 2018, when the agreement was approved by 24 countries in Escazú, Costa Rica, which is why it was

called the Escazú Agreement. There were 9 negotiation meetings, all broadcast online, with the participation of civil society and discussions in two languages (English and Spanish). We also had virtual preparatory meetings and specific working groups for some articles, such as access to information, participation, access to justice and international cooperation.

In addition to ECLAC’s structural and outstanding support, other United Nations (UN) bodies also participated actively in the process, such as the United Nations Environment Programme (UNEP). Some rapporteurs, such as the UN’s Organization Special Rapporteur on Human Rights and the Environment and the and the Rapporteurs on Freedom of Expression of the Organization of American States (OAS), were consulted at various points in the negotiation.

Regarding the countries, as the whole process took approximately 6 years, the government representatives and the position of the countries were not uniform throughout the negotiation. For this reason, highlighting the main actors is not an easy task. We list the countries that participated in the Presiding Officers:

Chile and Costa Rica as co-chairs, Argentina, Mexico, Peru, Saint Vincent and the Grenadines and Trinidad and Tobago as vice-presidents.

Regarding civil society, I can mention the work of the Access Initiative (TAI) and the organizations that comprise it, of human rights defenders and members of academia, such as Universidad del Rosario of Colombia, International Center for Research on Environment and Territory (CIAT) of Universidad de los Hemisferios of Ecuador and the Center for Environmental Law of the Law School of Universidad de Chile, among others.

Specifically regarding Brazil, we should mention the articulating role of some ministries, especially the Office of Federal Comptroller General (CGU), which participated in all meetings on the subject, both internal ministerial meetings and those with civil society. The CGU also held events about Principle 10 and made text suggestions for the negotiations, especially on access to information. Other bodies of the Brazilian government were also involved in the negotiations, albeit less constantly. The Ministry of Foreign Affairs represented Brazil in the negotiations and played a key role as one of the focal points of the Working Group on access to justice. The then-called Ministry of Human Rights made important contributions to the chapter on environmental defenders, and the Ministry of the Environment and the Ministry of Justice were also present at some of the internal meetings.

2) TMOJ & KFR: It is noteworthy that the negotiation and drafting of the agreement followed a unanimous decision-making model, focused on the broad participation of key actors from different sectors and countries. We would like to know from your perspective: how did the governance of this process work? How was the role and action of the actors responsible for coordinating the work, the decision-making process and the measures adopted in cases of dissent?

JM: *The negotiation of the Escazú Agreement has important characteristics that shape how proper multilateralism should work. Both the preparatory process (2012-2014) and the negotiations themselves (2014-2018) had the direct participation of civil society, which could express itself verbally during the meetings and draft proposals. To be incorporated into the text of the negotiation, civil society proposals had to be adopted by a country as its own proposal. Civil society, which was called “the public” during negotiations, could subscribe to a regional public mechanism (ECLAC, 2022) to receive updated information and documentation on the process. Through this mechanism, the six representatives of the public were elected, with 2 incumbents and 4 deputies, among people from Latin America and the Caribbean.*

Representatives of the public participated in the meetings of the Presiding Officers, together with the co-chair and vice-chair countries and with the support of ECLAC’s Technical Secretariat. The Presiding Officers are responsible for coordinating the work and organizing the meetings. Thematic working groups were also created. They had virtual meetings in between negotiation sessions. The virtual meetings were not deliberative, but featured presentations by experts on the topic and discussions on some of the most emblematic points as a way of knowing the positions of the countries.

The work between meetings and technical support was crucial to build consensus and seek text alternatives that made everyone comfortable. All negotiation was done on the basis of consensus, at no time was there a vote, for example. It is worth mentioning that the search for consensus created some challenges to the negotiations, considering, for example, the different justice systems between Latin America and the Caribbean. Civil society always sought consensus not to create the idea that we seek a “lowest common denominator” among countries, but instead a regional standard that drives gains in all countries.

3) TMOJ & KFR: In your view, what were the innovations and lessons learned from this consensus model? What benefits and challenges do you see in this decision-making model present in the Escazú Agreement, compared to more vertical models such as the Aarhus Convention⁴?

JM: *The negotiation of the Escazú Agreement brought important innovations and lessons to other processes. The use of two negotiating languages was a great challenge for translation and interpretation, but it contributed to both Latin American and Caribbean countries being able to confirm what the final text would look like in their language (with the exception of Brazil). Public participation also allowed examples of real cases to be cited, bringing visibility and concreteness to the legal text.*

The consensus model of negotiation created challenges for all countries to be comfortable, a factor that influenced the use of some adaptive terms, such as “according to national legislation”, “within the circumstances of each country” and “according to the national context”. Despite contributing to the progress of the negotiations and the achievement of consensus, using such terminology may influence the distinct implementation of the Escazú Agreement in the countries, distancing the objective from creating a regional standard. On the other hand, by being adopted by consensus, and making the necessary adaptations to their national contexts, countries are expected to face less internal resistance or difficulties in ratifying or acceding to the Escazú Agreement. As a result, the consensus form of negotiation could speed up the implementation of the Escazú Agreement and the guarantee of human rights contained in the text.

Finally, throughout the negotiation and also after it came into force, the Aarhus Convention was an important reference for the Escazú Agreement. On several occasions, ex-negotiators of Aarhus, civil society representatives and the current Aarhus Compliance Committee shared their experiences and recommendations to the Escazú agreement during the meetings.

4) TMOJ & KFR: Moving on to the provisions of the agreement, what gains did the agreement create to the promotion and guarantee of the right to access environmental information and what are the main

4. The Aarhus Convention was the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, organized by the United Nations Economic Commission for Europe in 1998 (EUROPEAN COMMISSION, 2022).

challenges for the effectiveness of this access in Latin America and the Caribbean? Also, considering the reality of Brazil, how should we think about these gains considering that both the production and the use of environmental information should not be restricted to the government?

JM: *Articles 5 and 6 of the Escazú Agreement are dedicated entirely to the right to information, but this right also appears in other parts, such as the mentions of the principle of transparency, the principle of accountability and the principle of maximum disclosure in Article 3 (Principles).*

In a nutshell, the Escazú Agreement establishes that States must make information available actively or passively (receiving requests for information), and also determines the deadlines and procedures to facilitate the guarantee of this right to information, observing the international principles already established. States should also invest in training and infrastructure for the proper functioning of information access mechanisms, and they should have independent bodies to oversee the guarantee of the right to information.

Brazil has a fairly advanced legislation regarding the right to information, but this does not mean that the Escazú Agreement does not bring gains for the guarantee of this right. For example, the text of the agreement provides for duties applicable to “competent authorities”, that is, those entities that have a duty to provide environmental information. The definition of competent authorities includes enterprises and entities that use public funds directly or indirectly or perform public functions, as well as all state bodies. This means that the State is not the only one with a duty to produce and provide environmental information, which directly helps to increase circulation of information and the understanding that the information of public interest is often not in State’s possession. This is a gain not only for civil society, but also for government agencies, which will be able to rely on more information to perform a good diagnosis and decide the best policy to be implemented.

We can also highlight other points, such as the duty to observe the public interest and the protection of human rights in the analysis of provision of information, including the public interest test and the commitment to immediately disclose all information that can help prevent and reduce damage in case of threats to public health and the environment. Along this line, there is a requirement to create an early warning system.

In the agreement, there is a chapter entirely dedicated to the production and dissemination of environmental information. It requires states to establish a pollutant release register in order to disclose information on harmful emissions released into the air, water and land. This chapter also demands the creation of several national environmental information systems and the production and dissemination of a national environmental report. By establishing a minimum standard of information that must be produced and disseminated, the Escazú Agreement will allow us to know a regional scenario of the environment and monitor it, which also helps comparisons and analyses between countries.

5) TMOJ & KFR: *The Escazú Agreement has a great focus on the potentialities of social participation, which is an advance in terms of international regulations in the region. However, we also know that there are many socioeconomic weaknesses and vulnerabilities in the region, which take significantly impair the ability of citizens to monitor and participate in decision-making. How to overcome these barriers? Also, how can a future implementation of the agreement dialogue with this reality?*

JM: *agreement dialogue with this reality?*

JM: Brazil’s structural problems, such as economic and social inequalities and racism, also influence the guarantee of the right to participation. For example, disparities in internet access and quality in different regions of the country can be barriers to social participation. Likewise, the use of technologies and technical language, as well as the times and locations chosen for a public consultation, for example, can be barriers to participation. To overcome these barriers, it is necessary to promote different formats and strategies of social participation, which consider different vulnerabilities and local particularities. For example, disclosure of information should include technical language as well as languages for common users. Online and offline forms of participation, indigenous people’s languages, and adequate advance notice when disclosing information should all be considered. These strategies should be followed by inclusive and structuring public policies that meet the needs of vulnerable groups.

The Escazú Agreement dictates that public participation should be open and inclusive in the decision-making process on environmental projects and activities, such as environmental licensing or projects that may have a signi-

ficant impact on the environment or people's health. To reduce barriers to participation, the Escazú Agreement establishes procedures for notifying and providing information to populations potentially affected by projects, including mentioning the minimum list of information that must be disclosed. Other important points are the duty to consider the views of civil society in decision-making processes and to provide special support to people in situations of social vulnerability.

6) TMOJ & KFR: Regarding the protection of human rights defenders in environmental matters, what is one of the main innovations of the agreement, since it was signed, what have we gained, and what have been the main challenges for the effectiveness of this access in Latin America and the Caribbean? And in Brazil, how do you see the effectiveness of this protection for defenders?

JM: *The Escazú Agreement is the first international agreement to provide specific measures for human rights defenders, with a chapter entirely dedicated to this topic. It is worth mentioning that in the original text that started the negotiations, there was only one paragraph in the article on access to justice regarding human rights defenders. Considering the relevance of the theme and the cases presented during the negotiations, as well as testimonies from the human rights defenders themselves arguing how their work is related to access to information, social participation and access to justice in environmental issues, this topic grew and became a chapter of its own.*

Among the main challenges to effectively implementing the rights of human rights defenders are the lack of adequate protective measures and public policies that allow the continuity of their work. When threatened, these people are often removed from the places where they were for safety reasons. Even if necessary, this situation can trigger fear within the community, which feels frightened. It is also necessary to emphasize that in some cases state agents themselves, or those related to the State, such as corrupt police officers, people with ties to mining and big farmers with political backing, may be involved in threats to human rights defenders. It would be important to invest in preventive actions that reduce the possibility of conflict itself, avoiding escalation to extreme situations. When threats do happen, it is necessary to invest in a quick and independent investigation to stop the growth of violence. The Escazú Agreement has an important point along this line when it refers to the enabling environment,

which means that the context or environment in which this defender is located is adequate so that he or she can continue their work.

7) TMOJ & KFR: Latin America and the Caribbean is a region with wide differences between its countries, facing different challenges in terms of social inequality, violence, political instability and the legitimacy of governments. The social and economic vulnerability resulting from these phenomena often limits people's ability to exercise their right to information. We ask: in your view, what possible set of implementation mechanisms could be adopted to address these challenges? How to effectively ensure access to information, public participation in processes, access to justice and protection of those who act as human rights defenders in environmental matters when facing economic vulnerability?

JM: *The work of human rights defenders is arduous and complex, and as we know, many times when defending the protection of the environment and human rights, they suffer threats and violence, including attempts on their lives. The Escazú Agreement has an important milestone, when its provisions mention a series of rights of human rights defenders that must be protected, such as the right to freedom of expression, right to assembly and the right to life. Economic and social protection is not explicitly mentioned in the text of the agreement, but can be inferred from the State's obligation to promote a safe and enabling environment. This expression means that defenders must have the appropriate conditions to perform their environmental and human rights protection work. This includes active protection mechanisms when corruption is reported, for example.*

8) TMOJ & KFR: Still regarding the context presented in the previous provocation, do you think the mechanisms for coordinating and monitoring implementation at the intergovernmental level, as provided for in the agreement, are sufficient? What are the improvements and complementarities still needed in the instruments that will still be developed from the Conference of the Parties and the functioning of the other governance bodies?

JM: *Some points that will be crucial for the implementation of the Escazú Agreement will be discussed precisely at the first COP, which will define what we call the "rules*

of the game". Among the topics are the rules of procedure, including the rules of public participation, the functioning of the Committee to Support Implementation and Compliance with the Agreement, among others, will have a direct impact on the development of the other conferences. Similarly, economic issues and cooperation mechanisms will help create the necessary framework to implement the agreement. To maintain the characteristics that made the Escazú Agreement notable and relevant at the international level, it is essential to respect the principle of non-regression and maintain and expand public participation.

Regarding possible improvements in monitoring instruments, one of the points discussed during the negotiations, but left out of the text, was the possibility that the Committee to Support Implementation and Compliance would receive direct communications from the public. This means that a person or organization could gather documentation on Escazú implementation and send it directly to the committee for analysis, such as a notice of non-compliance with the Agreement's provisions. This mechanism exists in other legal instruments and is considered an effective form of feedback and enforcement.

9) TMOJ & KFR: Talking about Brazil, in your perspective, what is missing in terms of mechanisms for coordinating and monitoring the implementing the agreement at the domestic level? What are the roles and mechanisms needed for a proper performance of public organizations at the three levels of government, alongside non-governmental and private organizations?

JM: First of all, unfortunately the Escazú Agreement is little known in Brazil, by both members of the government and civil society. Despite being directly related to issues that are at the heart of the agenda, such as climate emergency and environmental conflicts, little is known or said about the Escazú Agreement in Brazil. Thus, the first step would be to promote capacity building activities on the Escazú Agreement to help spread awareness of it. It would also be important to conduct debates and studies on the implementation of the Agreement in Brazil, aiming at possible adjustments that are necessary considering entry into force in the country.

In terms of structure, I understand that Brazil has public bodies and boards that could contribute directly to the coordination and monitoring of the Escazú Agreement, such as the CGU, the Ministry of the Environment,

IBAMA, the Public Prosecutor's Office, Congress and the participation bodies. It should be emphasized that, within the public councils, it is essential that broad participation of civil society is promoted and respected.

10) TMOJ & KFR: Finally, Joara, we would like to know your view on what will be the main effects on access to information from a future ratification of the agreement in Brazil. Also, how is civil society moving to get the agreement ratified?

JM: The Escazú Agreement has the potential to bring significant benefits to Brazil, especially concerning production of information, strengthening the participation mechanisms that are under threat and protecting human rights defenders. It also promotes more equal access to justice and overcomes barriers to social participation, supporting people and groups in vulnerable situations. In general, contrary to what is thought, ratifying the Escazú Agreement can also help create more investment in the country, especially in the field of "clean" energy.

Regarding specifically access to information, the Escazú Agreement requires the creation of an early warning system, a mechanism that would assist the disclosure of information related to disasters and the climate emergency. The competent authorities to produce and disseminate information established in the Escazú Agreement also provides more legal certainty to public managers when evaluating the progress of a contract. As this provision increases social control, it may help prevent situations such as Mariana and Brumadinho.

Speaking with members of civil society who are following the implementation of the Escazú Agreement, we perceive the need for the ratification process to move forward, because the further we distance ourselves, the further behind we will be. In any case, we do not need to wait for the agreement to come into force in Brazil to start considering its provisions as an interpretive tool. It is worth noting that the agreement comes from Principle 10 of Eco-92 and was created on a foundation of many aspects of our legislation. For example, the Escazú Agreement was used as a reference in some decisions of the CGU when analyzing information requests. We also have the important vote of Supreme Court Judge Rosa Weber when trying ADPF (action against the violation of a constitutional fundamental right) 623, concerning the National Environment Council (CONAMA).

The steps taken by members of society who are following the process have been toward strengthening the issue and

expanding the critical mass on the agreement, allowing more people learn about and debate it. We also have as a guideline to follow the negotiations of the first COP and their progress, participating in national and international meetings, although we have little support for this..

TMOJ & KFR: : Thank you for the interview and for the opportunity and availability for this moment of dialogue and growth, Joara.



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