

CLIMATE CHANGE, ENERGY AND ENVIRONMENT

MEXICO AND THE ESCAZÚ AGREEMENT

Legal implications of its effective implementation

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What makes the Escazú Agreement special?

The Escazú Agreement (EA) is a pioneering, innovative instrument in the Latin American and Caribbean region that clearly links and expresses the relationship between human rights and environmental law instruments. It forms part of the constitutional framework in Mexico and its fulfillment can be demanded in national courts. Since it is an international treaty on human and environmental rights, approved by the Mexican State, it is part of the Supreme Law of the Nation and can only be restricted under the conditions established by the Constitution itself (arts. 1 and 133. Political Constitution of the United Mexican States).

The Escazú Agreement establishes the minimum standards that the legislation of each member state must develop on instrumental rights, in other words, how to implement and operationalize the rights of access to information, participation, and justice in environmental matters for the protection of the right of each person (and future generations) to live in a healthy environment and to sustainable development (art. 1. EA). In addition, it is a realistic, groundbreaking treaty, in that it obliges States to protect environmental advocates in the most dangerous region for this activity (Art. 9. EA).

Several aspects make the Escazú Agreement a unique instrument, such as the following:

- It focuses on projects, activities, and permitting processes that have or may have a significant impact on the environment or health, which involves authorizations and permits outside the environmental sector.
- It views public participation in a comprehensive manner (linked to access to information and justice), with a preventive approach, and as the best means of dealing with environmental issues.
- It places special emphasis on guaranteeing the effective exercise of the rights of traditionally excluded (vulnerable) individuals or groups, for which procedures, materials, and decisions must be simple and culturally relevant.
- It establishes relevant definitions such as:
 - “Persons or groups in situations of vulnerability,” who, in the national context of each member state, face particular difficulties in exercising their rights.
 - “Competent authority,” which, for purposes of the right of access to information, also includes private organizations insofar as they directly or indirectly receive public funds or benefits.
- It promotes the simplification and accessibility of procedures for information requests and the delivery of information, such as advice and assistance in making requests or the translation of documents in non-official languages.
- It establishes a regime of exceptions and the grounds for denying the delivery of information in a very specific, circumscribed manner under the principle of maximum disclosure.
- It obliges member states to have autonomous, independent bodies responsible for guaranteeing effective access to public information. In the case of Mexico, it is necessary to guarantee the permanence and sufficient resources for the adequate performance of the National Institute of Transparency, Access to Information, and Personal Data Protection (INAI).
- Member States, such as Mexico, must ensure conditions for open, inclusive public participation from the early stages of the decision-making process, with reasonable time frames that allow sufficient time for informing the public and for effective public participation.
- It provides the opportunity to submit comments in appropriate, available ways (including written, electronic, or oral means). Likewise, the outcome of the participatory process should be considered in the authorities’ decisions.
- It establishes the right to participate in both general decisions (development of policies, strategies, plans, programs, rules, and regulations) and specific decisions (authorizations and permits for specific works and activities).
- It indicates that people must be informed of the decisions made, the reasons and grounds on which they are based, as well as the way in which their input was considered.
- Strategic information must be disseminated in non-technical, understandable language, and information must be provided on the procedure for complaints (administrative and judicial), among other topics. In a country like Mexico, the appropriate means must consider various social, cultural, and even infrastructural aspects. Community radio stations generally prove to be a valuable tool.
- It is the first international agreement that establishes obligations for member states to protect environmental advocates and to create a safe, peaceful environment for them.

- It focuses on expanding the avenues to demand compliance with environmental rights so that all people, especially those who belong to groups that have historically been excluded and are in vulnerable situations, can have equal access to justice.
- Each member State should guarantee the right to legally challenge and complain (challenge and appeal) on the substance or procedure of any decision, action, or omission related to access to information or participation, or that could adversely affect the environment or infringe legal norms related to the environment. Some of its main contributions are:
 - The obligation to adjust legal procedures, such as the translation of resolutions into non-official languages, the use of clear language, or free technical and legal assistance.
 - The concept of broad active legitimacy, which implies facilitating the requirements for the filing of lawsuits for possible environmental damage.
 - The possibility of applying dynamic burden or reversal of the burden of proof, which shifts the obligation to prove environmental damage or potential risk to those who undertake the activity or project.
 - The obligation of the member state to have specialized bodies in environmental matters for conflict resolution, and to establish reparation measures for damage such as restitution, compensation, or guarantees of non-recurrence.
 - The use of alternative means for environmental conflict-resolution, such as mediation, conciliation, or negotiation.
 - The obligation to have effective, timely, public, transparent, impartial procedures that are not prohibitively expensive.

The Escazú Agreement includes in its text an essential part that seeks to contribute to the achievement of its main objectives through the recognition of the work of human rights advocates in environmental matters, as well as the obligation it establishes for signatory states to guarantee that the undertaking of these activities takes place in a safe, favorable environment, the obligation to refrain from causing danger or aggression and, if necessary, the obligation to protect advocates in the exercise of their activities and their fundamental rights.

Work required to implement the Escazú Agreement in Mexico

The fact that the Escazú Agreement entered into force in April 2021 provides a historic opportunity for the Mexican State to advance the fulfillment of its international obligations and to achieve better governance and decision-making designed to guarantee the human right to a healthy environment. The following is an outline of the work required in various areas to achieve these goals.

1. Detailed review and strengthening of the applicable legal framework (inside and outside the environmental sector) to ensure compliance with the obligations established in both the Escazú Agreement and national legislation:

- Develop and implement early warning systems using appropriate, timely communication mechanisms; disseminate environmental information in the various languages used in the country, in understandable formats disseminated through appropriate media, ensuring that the needs of women are met; promote access to environmental information in concessions, contracts, agreements, and authorizations of goods, services, or public resources; disseminate the rights of users to have official, relevant, and clear information on the environmental and health effects of products and services.
- Analysis of the implementation of exceptional regimes for the delivery of environmental information in light of the Escazú Agreement, and in particular those provided for in Article 6. The analysis should generate proposals for improvement. In particular, it is suggested that the General Ecological Balance and Environmental Protection Act, the General Climate

Change Act, the General Wildlife Act, the General Waste Prevention and Integral Management Act, the General Sustainable Forestry Development Act, the National Waters Act, the Federal Environmental Responsibility Act, the Federal Transparency and Access to Public Information Act, and the General Transparency and Access to Public Information Act be reviewed.

- Ensure effective participation mechanisms in all legislation, and provide understandable, timely information, through appropriate means on a) the type or nature of the environmental decision in question and, where appropriate, in non-technical language; b) the authority responsible for the decision-making process and other authorities and institutions involved; c) the procedure planned for public participation, including its start and end dates, the mechanisms planned for this participation, and, where appropriate, the places and dates of consultation or public hearing; and d) the public authorities involved from which further information on the environmental decision in question may be requested, and the procedures for requesting this information.
 - Conduct a detailed analysis of the legal framework applicable to activities and projects whose implementation may have an impact on the environment, health, and rights of vulnerable people and communities.
 - Generate proposals for legal ordinances that effectively guarantee respect for and protection of the self-determination and autonomy of indigenous peoples over their territories and multicultural heritage. This is based on the recognition and respect for the governing bodies and institutions of these peoples.
2. Exchange of international experiences on the implementation of the Escazú Agreement with presentations by experts.
 3. Translate strategic information into indigenous languages, such as the content of the Escazú Agreement, guides for access to information, principal laws, policies on climate change mitigation and adaptation, etc.
 4. Develop and disseminate awareness-raising materials explaining the contents of the Agreement to individuals and civil society organizations. These resources, which may include infographics and audiovisual materials, should provide specific information on how to participate by filing complaints and legal recourse against authorizations for projects that may affect the environment, natural resources, or human health, and that are granted without respecting or allowing public participation under the terms established by the Escazú Agreement.
 5. Strengthen the capacities of both authorities and civil society to comply with their obligations and exercise their rights of access in environmental matters under Mexican law, as well as the rights and obligations arising from the Escazú Agreement. These processes must be undertaken in a culturally appropriate manner, with a gender perspective, reinforcing the exercise of women's rights, in non-technical language that can be understood by all people, including indigenous peoples, and similar communities.
 6. Specific training for environmental advocates on justice in environmental matters (precautionary principle, reversal of the burden of proof, broad procedural legitimacy, gender perspective, cultural relevance, procedural requirements for legal actions, reparation measures related to environmental damage, protection of collective and diffuse interests).
 7. Rapprochement with the private sector to generate a work strategy aimed at raising awareness of the Escazú Agreement to achieve its appropriation and internalization among the business community.
 8. Exchange of experiences between Mexico and Latin America with presentations by experts in the field, particularly on human rights defenders, as well as challenges for the implementation of Article 9 of the Escazú Agreement in the region.
 9. Develop and establish coordination mechanisms with environmental defenders for the effective enjoyment of their rights. Design, implement, and supervise a system for managing information disaggregated by sex on the situation of environmental defenders, protection mechanisms, as well as precautionary and protection measures for their effective attention with a gender and intersectional perspective.
 10. Raise awareness of the importance of the environmental defense work carried out by women and men and prevent violations of their human rights.

ABOUT THE AUTHOR

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