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Environmental Rights and Conflicts over Raw Materials in Latin America

The Escazú Agreement Is Ready to Come into Force in 2021

Günther Maihold and Viktoria Reisch

On 5 November 2020 Mexico ratified the so-called Escazú Agreement, a treaty between Latin American and Caribbean states on establishing regional transparency and environment standards, as the eleventh country to do so. The prescribed quorum of ratifications has thus been attained, and the agreement can come into force in 2021. This will launch an innovative multilateral instrument that is intended to create more citizen participation and improve the assertion of citizens' rights in environmental matters. In Latin America, economic interests dominate when it comes to the exploitation of raw materials; furthermore, there is a large number of conflicts over resources. The agreement thus offers affected indigenous tribes and human-rights defenders more opportunities for information, participation and access to the justice system in environmental matters. Despite this binding first step, some leading countries in the region have so far failed to ratify the agreement. Many of them are reluctant to join, arguing that certain provisions violate their national sovereignty and their freedom of decision. For Germany and Europe, the agreement offers new leverage for drafting supply chain laws.

By the end of 2020, a total of twelve Latin American and Caribbean countries had ratified this "Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean". The "Escazú Agreement" is considered a breakthrough in efforts to safeguard environmental rights. The region has a long history of destroying ecosystems while exploiting natural resources for export (extractivism). The socio-ecological conflicts associated with this form part of the context of lasting violence on the subcontinent.

The agreement, concluded in Escazú (Costa Rica) in March 2018, is based on Principle 10 of the 1992 Rio Declaration on Environment and Development, which establishes transparency, participation and access to justice for citizens impacted by environmental problems. It was signed in 2018, after four years of tough negotiations between 24 countries in the region. The ratification process, which began in September 2018, is proving to be just as difficult.

Mexico's ratification ensured that the quorum was reached for the agreement to come into force in 2021. However, impor-

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Map 1

tant countries such as Brazil, Chile, Peru and Venezuela, which are active extractors and exporters of raw materials, have not yet followed suit. On the contrary: there is massive resistance, especially from business sectors, to the scope of the regulations, which are seen as interfering in national sovereignty. It has been claimed that, with the agreement in effect, countries would no longer be able to make independent decisions about how their territories are used. Some parliaments, for example in Peru and Paraguay, have therefore removed the issue from their agendas. However, other countries, including Colombia, have initiated ratification processes and can be expected to join.

The Four Pillars of the Escazú Agreement

The agreement creates a joint regional legal framework that brings together four elements to enable new forms of sustainable development in Latin America: access to environmental information; the right to participation; access to justice for citizens affected by resource exploitation; and protective mechanisms for environmental activists. The principles of prevention, precaution and monitoring are thus connected to legal guarantees by environmental and social impact studies and compensation for damage. The agreement is intended to have a preventative effect and specifically preempt the escalation of socio-ecological conflicts into open violence.

The Escazú Agreement is the first document in the world to stipulate procedural safeguards to protect activists who campaign for the preservation of natural resources. The agreement therefore also exceeds the European Aarhus Convention from 1998. By conferring the rights of information, participation and legal protection on individuals, Latin America will simultaneously expand possibilities for implementing international and national environmental standards more lastingly.

The participatory formats stipulated in the agreement are intended as means for conflict prevention and for upholding fundamental human rights, such as those already contained in Convention 169 of the International Labour Organisation (ILO; short form: ILO 169) for the protection of indigenous peoples. They are meant to lay down regional minimum standards. Every country has to accept the formulated norms so as to guarantee the exercise of the rights referred to. The norms are to be met by states implementing measures to improve their national institutions; they also have to create mechanisms to manage information and optimise decision-making procedures that include intercultural and gender-specific approaches. In particular, signatories commit to preventing environmental damage and ensuring that environmental rights are respected. Crucially, this includes businesses: public and private companies (especially large companies) are to draw up sustainability reports to disclose their social and ecological record.

Current reality is far removed from this. Often, deposits are identified and developed without the local population being involved or consulted. Transparency imperatives are also violated in information on the projects' environmental impact, long-term effects and emissions; possibilities for lodging complaints are systematically subverted. The agreement's ultimate objective is therefore to transform socio-ecological conflicts, with the particular aim of preventing them from turning violent. A further important concern is to protect environmental activists from intimidation and hostility as much as from threats to life and limb.

Socio-Ecological Conflicts

Since the turn of this century, (civil-society) organisations and academics have been recording a rise in land and environmental conflicts in Latin America — initially primarily in the Andean countries, but since the 2010s in all Latin American states without exception. In the Environmental Justice Atlas, Latin America leads the world in the number of environmental conflicts.

Socio-ecological conflicts refer to the mobilisation of usually local communities or civil-society organisations against economic activities whose environmental consequences are a key element of their complaints. Typical expressions are protest marches, squatting, street blockades or hunger strikes. The term "environmental conflict" will here be used mostly synonymously with "socio-ecological conflict".

Restrictions on reporting and monitoring mean that the number of unreported cases in other parts of the world is expected to be substantial; nevertheless, statistics indicate that many countries in the Americas are experiencing more conflicts. The mining sector is particularly conflictual. Over 40 percent of the environmental conflicts in the continent's ten most conflict-ridden countries are linked to extraction of minerals (see Chart). Sources also indicate that violence is escalating in other sectors, for instance in energy production, which is closely linked to energy-intensive mining. Alongside economic issues such as no rise in employment in the productive sector, dependency on the price of raw materials on the world market, and high ecological costs, there are also a large number of related social divides. Rarely can a conflict resulting from extractivism be categorised as a single-issue conflict. Often concerns revolve around the destruction of habitat and biodiversity, the displacement or resettling of local communities, or obtaining an adequate share in the income derived

Chart1

Top-10 countries with environmental conflicts in Latin America
2000–2020, as of 25 November 2020

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from resource mining and being involved in decision-making processes.

Risks for Land and Environmental Defenders

The group of actors most impacted by such conflicts are those who campaign for land and environmental rights in Latin America. They are, to quote the title of the 2015 report by the international non-governmental organisation (NGO) Global Witness, On Dangerous Ground in Latin America. The report calls 2015 the deadliest year for such actors since it began recording cases in 2002. However, subsequent years saw further rises.

Numerous Latin American countries feature on the list of the most dangerous countries for activists on land and environmental issues, above all Colombia, Brazil and Mexico. The mining sector, which is heavily conflict-laden, also has the highest number of murdered activists. Defenders of indigenous rights, who are primarily concerned about preserving indigenous environmental and territorial rights, are under disproportionately high pressure. In the majority of cases, murder victims, or their entourage, have previously been threatened or attacked.

In its annual report, CIVICUS, a global alliance of civil-society organisations and activists, lists the five most frequent repressive acts in Latin America: detention of protesters, attacks on journalists, intimidation and use of excessive force against protesters, and detention of journalists. There are also subtler forms of restriction, which are often not considered a direct threat, such as poor consultation processes, which refuse to give certain groups of people a legal voice, or threats and pressure by companies (including state-run companies) to coopt activists so as to pre-empt conflicts in the first place. The intensity of the violence against human-rights defenders can therefore not be measured by the number of assassinations alone, but must also take into account the many non-deadly attacks.

Profit interests, which play a key role in the mining of natural resources, are the reason for the particularly high risk to land and environmental defenders in Latin America. These interests can gain the upper hand over the duty to protect, especially in a situation where corruption is rampant, governments are weak, and poverty reigns. The above-mentioned reports also repeatedly point to the shared responsibility of governments and companies. The latter, the reports say, criminalise land and environmental activists and prosecute them under the law to systematically repress protests.

Many countries flout the right of indigenous peoples to consultation, which is laid

down in the above-mentioned Convention 169 adopted by the International Labour Organisation. Countries that have signed the convention are supposed to secure the free, prior and informed consent of indigenous peoples for investment projects in the raw materials sector. Most Latin American countries have even ratified the convention (with the exception of Uruguay, Panama and El Salvador); some have also absorbed its fundamental principles into their constitutions. However, there is nothing like systematic implementation.

As with human-rights standards, it is often the case that countries with progressive environmental and consultation laws (such as Brazil or Peru) fail to live up to their voluntary commitments. However, extractive interests are not solely responsible for the injustices: so are the international community, which has not yet issued binding rules, and in some cases national and international development banks involved in infrastructure measures and projects for natural resource exploitation. Infringements or human-rights violations are seldom thoroughly investigated; legal proceedings or convictions are rare. This far-reaching impunity perpetuates the spiral of violence and leads to a loss of confidence in national justice systems. In contrast, allowing broad access to information and involvement in decision-making processes has the potential to resolve conflicts before they escalate.

Resistance to the Agreement

Many large countries that play a crucial role in Latin American foreign policies have so far refused to ratify the Escazú Agreement. Along with Brazil, which has shown no intention to ratify, they include Peru, which has a particularly high number of land and environmental conflicts, as well as Chile, where environmental conflicts have been increasing for years. This is the more remarkable since Chile was one of the initiators of the agreement. To date, however, it has not even signed it.

Chile: A Radical Change of Direction

Chile had a leading role in the preparations and negotiations for the Escazú Agreement. After about two years of preparation, the Santiago Decision to adopt the prepared document was announced in the Chilean capital in November 2014. Chile along with Costa Rica was awarded the co-presidency for the subsequent negotiations. There were a total of nine rounds of negotiations over the next four years.

Chile's U-turn came a few days before the final text was adopted in early October 2018. A vital influence was probably the result of the 2017 presidential elections, which saw the centre-left government of President Michelle Bachelet replaced by a rightwing-conservative coalition under Sebastián Piñera, which attaches greater value to economic interests.

As the main motive for rejecting the agreement, Chile's decision-makers currently in office cite their concern that Chile might lose sovereignty and be subject to interference in internal affairs and particularly in bilateral disputes (for instance with neighbouring Bolivia). Most recently, the Chilean government argued that national legislation already contained all the key regulations of the Escazú Agreement. Special laws for environmental activists, it claimed, would privilege the latter, thus creating unequal treatment of various human-rights groups before the law. It is true that Chile has adopted legal regulations in areas that are also addressed by the agreement. Not least, these concern large state companies, such as the copper corporation CODELCO. Often, however, these national rules only cover parts of the Escazú proposals or are only inadequately implemented at best. It is therefore essential not only to adjust the legislation, but also to create additional transparency obligations via a national plan for implementing the Escazú Agreement, and, above all, to ensure that their implementation in line with regional standards can be monitored.

In December 2019 Chile chaired the UN Climate Conference (COP25). Many Chilean civil-society organisations campaigning for environmental and human rights expected the government to change its position on the Escazú Agreement so as to set an example on the international stage. Their disappointment was the greater when the government vehemently refused to sign the agreement and provided only weak leadership for the COP25, which was supposed to be held in Santiago de Chile, but was relocated to Madrid following social protests in the country.

Peru: Concerns about Autonomous Action in Exploiting Raw Materials

In 2018 Peru's then-environment minister Fabiola Muñoz was one of the first signatories of the Escazú Agreement. The country was long seen as a strong advocate as well as a candidate for rapid ratification. Yet the latter kept being postponed during parliamentary debates on the treaty. The decision not to ratify the agreement was ultimately taken in October 2020, overriding the Peruvian president.

The Viability of Criticism of the Agreement

Both Chile and Peru argue that their right to sovereignty would be restricted if international courts were given jurisdiction. They also consider that NGOs are receiving disproportionately preferential treatment by being given a powerful voice in complaints mechanisms through the right to participation laid down in the agreement. This carries the risk, the countries claim, that such NGOs could thwart mining and infrastructure projects that are vital for the national economy. Trade and industry associations in particular have expressed grave concerns in public statements. They point to the rejection of the agreement by other economically powerful countries such as Brazil or members of the Pacific Alliance such as Peru, Chile, Colombia and Mexico (which had not yet ratified the Escazú Agreement at the time), who have founded a free trade area within this framework. Peru therefore argues that it might be at a competitive disadvantage and implies that the countries it names have good reasons for rejecting ratification.

The arguments against the agreement advanced by Chile and Peru are weak. Article 3 of the Escazú Agreement reiterates the principles of a country's unabated sovereignty over its own natural resources and of the sovereign equality of all member states. This also includes a country's freedom to set its environmental policy autonomously. Mexico's ultimate ratification and the fact that Colombia is moving towards ratifying as well make the argument of a competitive economic disadvantage baseless. The agreement obliges countries to shape their policies according to the duty to protect laid down in it; this would help them deal with international monitoring of their compliance with labour and environment standards. If Chile and Peru were to accept this duty to protect, their reputations might well benefit since their national legislation would then meet international requirements. Moreover, the associated chances of participating in development programmes would make it easier for them to meet their duty to protect.

This is the opportunity but also the challenge presented by the Escazú Agreement in the context of new international requirements to uphold human rights and due diligence. Both Peru with its national ombudsperson and Chile, for instance in its National Human Rights Institute, already have institutions tasked with observing and safeguarding basic rights — including in mining with a view to the environment and to human rights. These enjoy a high degree of legitimacy in the eyes of the population, unlike other state bodies. Both countries thus have an institutional basis that would enable them to keep the commitments set out in the Escazú Agreement and simultaneously to strengthen their facilities for conflict prevention and management.

The Escazú Agreement and the Regulation of International Supply Chains

As a regional agreement, the Escazú Agreement will establish uniform transnational standards and set in motion a process to offset institutional and legislative asymmetries among the region's various countries. The ultimate objective is to achieve the highest possible degree of equality between countries in the Escazú Agreement's four pillars for protecting, safeguarding and promoting access rights. By proceeding cooperatively, the countries involved could exchange learning experiences and best-practice patterns, which would also improve the implementation of, and compliance with, standards. As a concrete expression of the 2011 UN Guiding Principles on Business and Human Rights, the Escazú Agreement along with the environmental standards set by the American Human Rights Convention (1969) could create synergies to shape a regionally uniform and binding framework for environmental and human-rights protection by companies and states. The efficacy of the agreement will depend on how robust the legal provisions and financial conditions are (for instance for environmental impact assessment studies and on how consistently the judiciary enforces the provisions.

While Latin America's manufacturing industry is not part of supply chains on a large scale, the key focus of regulations like the Escazú Agreement is on the extensive responsibility of companies when it comes to extracting and processing raw materials. Current debates in Germany and Europe on supply chain laws are closely followed in the region, and the challenges that they pose to the corporate or state responsibility derived from them are discussed with a critical eye. The Escazú Agreement addresses regulatory facts that are also relevant for contemporary debates on designing corporate responsibility. Lawmakers should therefore take up the standards formulated in the region (for instance in the Escazú Agreement) and include them in their considerations. It is precisely this complementarity of international, regional and local norm-setting that could steer businesses towards a conduct that exceeds voluntary commitments. However, if the expectations and commitments to standards do not correlate, this regulatory heterogeneity would impede efforts to generate greater attention and respect for human-rights and environmental standards.

The efficacy of both voluntary and legal regulations is disputed. Extensive standards of the kind that the Extractive Industries Transparency Initiative (EITI) is trying to establish, for instance, to create more transparency in finances and more accountability in the raw materials sector, are not at all applied uniformly in Latin America's extractive countries. Mining-sector companies in particular have additionally implemented standards for audit certification on the basis of agreements already in force — for instance via quality seals such as the FairTrade standard for gold or silver. However, such voluntary standards for corporate responsibility should be rolled out with restraint in favour of increased coherence, which is ultimately in the companies' interest too. To date, the rules have frequently not been applied to ancillary industries or local production processes.

Along with labour conditions, the main focus is on environmental consequences. For instance, in the case of copper extraction, the huge amounts of water used, the land use, energy use, mining overburden and long-term emissions must also be taken into account. The copper industry currently is beginning to record all these factors for mines and foundries, as part of voluntary monitoring processes; in future, they are to be collated under the quality seal Copper Mark. However, these transparency initiatives, including complementary general mining standards, such as the Initiative for Responsible Mining Assurance (IRMA), fall noticeably short of the Escazú regulations. Moreover, they do not stipulate any sanctions to enforce due diligence in human and environmental rights, or to do justice to the duty to protect. The Escazú Agree-

ment standards have the appropriate regulatory scope. Germany and Europe should therefore aim to make them binding for both European companies and government cooperation; they should also support implementation. This could be achieved through national action plans for human rights and the environment, as well as reports on the progress made in implementing the agreement.

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