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Assessing environmental democracy in Latin America and  
the Caribbean: The Escazú Agreement and the Yasuní  
popular consultation by citizen initiative.

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**Abstract:**

Access rights in environmental matters have gained international attention in the search for credible and effective solutions to the climate and environmental crisis. These rights supposedly promote environmental democracy, granting its citizens with environmental information, mechanisms for participation in environmental decision-making and access to environmental justice. The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, entered into force in 2021 and obliges the member states of Latin America and the Caribbean to grant these rights to their citizens, with the aim to guarantee their right to a healthy environment. The aim of this thesis is to assess the added value of this agreement to environmental democracy in Latin America and the Caribbean. Particular attention is given to the right to participate in environmental decision-making through direct democracy mechanisms. The case study of the Yasuní popular consultation on citizen initiative that has taken place in Ecuador in August 2023 is used to make this assessment.

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## Abbreviations

Art(s)	Article(s)
CC	Constitutional Court
CNE	Consejo Nacional Electoral
COP	Conference of the Parties
CRE	Constitución de la República de Ecuador
ECLAC	Economic Commission for Latin America and the Caribbean
Escazú Agreement	Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean
ITT	Ishpingo-Tambococha-Tiputini
LAC	Latin America and the Caribbean
LOGJCCCC	Ley organica de garantías jurisdiccionales y control constitucional
LOPC	Ley Organica de participación ciudadana
Para(s)	Paragraph(s)

PCCCI	Public consultation on citizens' initiative
UNFCCC	United Nations Framework Convention on Climate Change

## Figures and tables

	Spanish	English	Ecuador legal regime
Public Consultation	Consulta previa, libre e informada	Prior, free and informed consultation	CRE 57.7
	Consulta prelegislativa	Prelegislative consultation	CRE 57.17
	Consulta ambiental	Environmental consultation	CRE 398
Direct Democracy	Referendums/plesbiscites	Referendums/plesbiscites	LOPC 5; 13
	Consulta popular por iniciativa ciudadana	Citizen initiative	LOPC 21
	Iniciativa popular normativa	Agenda setting	LOPC 6
	Revocatoria del mandato	Recall	LOPC25

Figure 1. Consultation and direct democracy participatory mechanisms and their Spanish and English equivalents.

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# Chapter 1. Introduction

## 1.1. Background: environmental democracy, access rights, and the Escazú Agreement

### 1.1.1. Environmental democracy

In the face of a ramping climate and environmental crisis impacting all levels of society, recent years have seen a rise in climate marches and strikes that created a global climate and environmental movement. Greta Thunberg, as one of its protagonists, voiced the movements concerns as follows during the UNFCCC 24<sup>th</sup> Conference of the Parties in 2018: 'We have not come here to beg world leaders to care. You have ignored us in the past and you will ignore us again. You've run out of excuses and we're running out of time. We've come here to let you know that change is coming whether you like it or not. The real power belongs to the people'.<sup>1</sup>

Her words seem to translate the citizens' distrust in their representatives and their sense of urgency to change the status quo, as well as their willingness to engage in these processes. This speech is underpinned by the analysis that current political institutions fail at securing the well-being of the planet and its citizens who feel excluded from the decisions affecting them. This distance between the representatives and those represented in the dominant model of liberal representative democracies, creates a lack of legitimacy of the former in the eyes of the latter who do not feel like their interests are being considered or advocated for.<sup>2</sup> This distance, theorized as "democratic deficit", can be attributed to a series of social, economic and political conditions such as a lack of information and political education, complex rules that hinder participation, slow and bureaucratic processes and political scandals that have created frustration, disillusion and disengagement of the citizens. Moreover, representative democracies are rhythmmed by relatively short mandates, which results in representatives trying to secure their re-election or the popularity

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<sup>1</sup> Greta Thunberg, in a speech at the UN Climate Change COP24 Conference, 2018.

<sup>2</sup> Parola 2013, p 22.



of their party with attractive programs prioritizing demands of capital and labour over environmental protection.<sup>3</sup>

As a response, ecological thought has brought forward three alternative governance models to current liberal representative systems: environmental democracy, green authoritarianism and green anarchism.<sup>4</sup> In her book 'Environmental democracy at the global level: rights and duties for a new citizenship', Giulia Parola points out that the democratic deficit contributes to the environmental crisis as it leads to the underrepresentation of the interests of non-humans (ecosystems, animals and other species), non-nationals and future generations.<sup>5</sup> She thereby advocates to address these insufficiencies through more participatory and deliberative forms of democracy to "reabsorb citizens in the public debate and political procedures".<sup>6</sup>

This process of "democratising our democracies" is intrinsically linked to the tackling of the environmental crisis. Parola cites various research showing how improved democracy leads to better environmental governance.<sup>7</sup> This happens through informed and involved citizens, and enhanced state compliance with their environmental obligations.<sup>8</sup> Environmental democracy can thus be summarized as a reshaped liberal representative democracy with mechanisms of participation and deliberation that results in an 'environmentally protective and radically democratic model', both at local and global levels.<sup>9</sup>

### **1.1.2. Access rights and the Escazú Agreement**

In such environmental democracy system, citizens would enjoy environmental rights.<sup>10</sup> These rights can be divided into substantive and procedural rights.<sup>11</sup> On one hand, substantive

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<sup>3</sup> Parola 2013, p 46.

<sup>4</sup> Ibid, p 44.

<sup>5</sup> Ibid, p 46.

<sup>6</sup> Ibid, p 29.

<sup>7</sup> Ibid, p 45.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid, p 46.

<sup>10</sup> Ibid, p 61.

<sup>11</sup> Ibid, p 60.

environmental rights refer to those that citizens have to a quality of environment the state should guarantee. International instruments have referred to these as rights to 'a decent environment', 'safe environment', 'adequate environment' or simply 'a right to environment', but so far, no conclusive or clear definition has been agreed upon.<sup>12</sup>

Procedural rights or access rights, on the other hand, are claimed to be 'the pivot in the trilateral relationship of individual/human rights, democracy and environmental protection' as their establishment guarantees the effectiveness of any substantive environmental right.<sup>13</sup> These procedural rights relate to access to information, access to justice and participation in environmental matters. They are thus widely regarded as the building stones of environmental democracy.<sup>14</sup> Gellers and Jeffords cite multiple research showing that incorporating environmental access rights in environmental governance leads to more effective and robust environmental efforts and protection.<sup>15</sup> This happens through the enhanced transparency, inclusion of vulnerable or marginalized (environmental) groups, an increased capacity of citizens to hold public and private actors accountable for their environmental commitments, and a more empowered civil society.<sup>16</sup> Enhanced procedural environmental rights thus lead to a more robust environmental democracy, which allows improved environmental governance and protection.

Environmental access rights have been gaining attention in the United Nations within the framework of environmental crisis management. Principle 10 of the Rio Declaration on Environment and Development describes them as essential to handle environmental issues as these are best handled with the participation of all concerned citizens, at the relevant level, for which access to information and effective access to justice are a must.<sup>17</sup>

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<sup>12</sup> Ibid, p 63.

<sup>13</sup> Ibid, p 67.

<sup>14</sup> Gellers and Jeffords 2018, p 100.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Rio Declaration on Environment and Development 1992, principle 10.

Environmental access rights have been mentioned by various other hard law and soft law instruments, including the Millennium Summit in 2000<sup>18</sup>, the World Summit on Sustainable Development in 2002<sup>19</sup>, and notably, the Rio+20 Summit or United Nations Conference on Sustainable Development in 2012<sup>20</sup>. One of the most recent instruments is the 'Regional Agreement on Access to Information, Public Participation, and Justice in Environmental Matters in Latin America and the Caribbean', known as the Escazú Agreement. At the Rio+20 summit, 10 Latin American states adopted the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean.<sup>21</sup> This set the stage for negotiations that culminated in the adoption of the Escazú Agreement on the 4<sup>th</sup> of March 2018 and its entry into force on the 22<sup>nd</sup> of April 2021.<sup>22</sup> It stands as 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'.<sup>23</sup>

While the Escazú Agreement holds some promises for a region that is home to some of the world's most biodiverse ecosystems while being one of the most hazardous regions for their environmental and human rights defenders, its impact remains to be tested.<sup>24</sup> The region is currently the scene to vivid contestation and strong claims for systematic changes originating in a civil society denouncing corruption, human rights violations, social and economic injustices, political insufficiencies, climate crisis and environmental destruction. In this context, the Escazú Agreement appears to mirror the growing concerns of citizens who are advocating for a voice in

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<sup>18</sup> United Nations, 'Millennium Summit, 6-8 September 2000, New York', <https://www.un.org/en/conferences/environment/newyork2000>.

<sup>19</sup> United Nations, 'World Summit on Sustainable Development, 26 August-4 September 2002, Johannesburg', <https://www.un.org/en/conferences/environment/johannesburg2002>.

<sup>20</sup> Sustainable Development Goals knowledge platform, 'United Nations Conference on Sustainable Development, Rio+20', <https://sustainabledevelopment.un.org/rio20>.

<sup>21</sup> Rodriguez and Menezes 2023, p 90.

<sup>22</sup> United Nations, 'Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean', <https://www.cepal.org/en/escazuagreement>.

<sup>23</sup> Economic Commission for Latin America and the Caribbean (ECLAC), 2023, p 28.

<sup>24</sup> Global Witness 'Standing Firm. The Land and Environmental Defenders on the frontlines of the climate crisis', <https://www.globalwitness.org/en/campaigns/environmental-activists/standing-firm/>.

the management of the environment. This has been strikingly illustrated in Ecuador in the summer of 2023, where two popular consultations by citizen initiatives (PCCI) (*Consulta popular por iniciativa ciudadana*) were organized on environmental matters.

The Ecuadorian Constitutional Court defines a popular consultation as a direct democracy tool that can be triggered by three different actors: the President of the Republic, the decentralized autonomous governments, and the citizens. During this consultation, the citizenry is asked to pronounce itself through a local or national electoral process, either supporting or opposing a proposal.<sup>25</sup>

PCCIs lie at the intersection of the three access rights granted by the Escazú Agreement: to initiate and engage in this mechanism effectively, citizens must have access to environmental information<sup>26</sup> and must be able to participate<sup>27</sup> in environmental decision-making. If these access rights are unjustly denied, citizens should have a right to environmental justice.<sup>28</sup>

The young Escazú Agreement and PCCIs are thus linked by the fact that the former guarantees the access rights necessary to organise the latter. To analyse whether the Escazú Agreement has added value for the access right of participation, this thesis will analyse the PCCIs on the topic of the oil exploitation in the Yasuní.

This PCCI was initiated by the environmental collective YASunidos (after the word game Yasuní and *Unidos*, Spanish for united) in 2013, who voiced their discontentment with the Ecuadorian fossil fuel extraction of the Ishpingo-Tambococha-Tiputini (ITT) oil field in the Yasuní National Park, located in the Amazon rainforest. Despite complying with the constitutional requirements, this initiative faced political, procedural, legal, and judicial obstacles and the whole process took place in the context of expanding oil activities in the Yasuní and related state pressure to halt the acceptance of the public consultation.<sup>29</sup> The consultation was held on August 20, 2023 and

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<sup>25</sup> Constitutional Court of Ecuador 2021, Caso No. 1149-19-JP/20, para. 268.

<sup>26</sup> Escazú Agreement, art. 5.

<sup>27</sup> *Ibid*, art. 7.

<sup>28</sup> *Ibid*, art. 8.

<sup>29</sup> Vela-Almeda and Torres 2021, p 182.

Ecuadorian citizens were asked 'Do you agree that the Ecuadorian government should keep the ITT oil, known as Block 43, in the ground indefinitely?'. The 'Yes' option prevailed with just over 58% of the vote, implying that Petroecuador, the state oil company operating in the area, would be required to vacate the ITT zone in an orderly and progressive manner within a year. In the aftermath, the consultation faced other adversities as various authorities have raised various political and legal arguments to deny the validity of the consultation and the implementation of its results.<sup>30</sup>

## 1.2. Research objectives and questions.

This thesis aims to analyse the added value of the Escazú Agreement to environmental democracy, focusing particularly on the right of participation in environmental decision-making through mechanisms such as PCCIs. To do so, the study will evaluate the application of the Escazú Agreement using the Yasuní PCCI as a case study. It seeks to explore how the international obligations enshrined in the Agreement have been and how they should be applied in the organisation and carrying out of future environmental PCCIs, addressing existing legal and procedural barriers, and guaranteeing effective citizens participation. The main research question will thus be: 'In what ways does the Escazú Agreement contribute to environmental democracy, and specifically, to the right to participate in environmental decision-making through the organisation of popular consultations by citizen initiative in environmental matters?'

This broad research question will be divided into the following sub-questions:

1. What is the right to participate and what are the different mechanisms and tools for citizens to exercise this right?
2. What is a PCCI in environmental matters and what are its specificities?
3. What is the legal regime regarding PCCIs in Ecuador?

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<sup>30</sup> The Guardian, 'Ecuador presidential candidates should listen to its people on Amazon drilling', <https://www.theguardian.com/world/2023/sep/06/ecuadors-presidential-candidates-should-listen-to-its-people-on-amazon-drilling>.

4. What is the right to participate in environmental decision-making and how does the Escazú Agreement formulate it? What are state obligations concerning this right?
5. What is the Yasuní PCCI?
6. What were the (legal and procedural) shortcomings of the Yasuní PCCI in the light of the obligations imposed by the Escazú Agreement?
7. How would this case have been handled if the Escazú Agreement had been applied and implemented correctly?
8. In similar future cases of environmental PCCIs, what will be the likely added value of the Escazú Agreement? What are the additional tools it provides for?

### **1.3. Limitations**

The main limitations of this thesis are threefold:

First, as the Escazú Agreement is in its very first years as it has recently entered into force, its implementation has been minimal thus far. Research on the Agreement is also limited. Research on its added value to environmental democracy, thus remains tentative. To avoid speculation, it will focus on the legal text of the Agreement, but its conclusions must be approached with caution.

A second limitation revolves around the intricate nature of international agreement implementation, extending far beyond the straightforward application of its outlined provisions. While this thesis primarily examines both the Escazú Agreement and the Yasuní PCCI through a legal lens, it recognizes the influence of multifaceted social, political, economic, and practical dynamics. As the thesis aspires to present a comprehensive analysis, it will address these dynamics that might not be fully captured within the legal framework, but without claiming to be exhaustive.

Finally, it is important to note that this thesis primarily focuses on Ecuadorian civil and constitutional law, which is predominantly written in Spanish. Most legal documents consulted are in Spanish, and interviews were conducted in the same language. To enhance readability, Spanish legal terms have been translated into their English equivalents. However, it should be noted that

the nuances of the Ecuadorian legal system are reflected in the specific usage of these terms, which may not always have a direct counterpart in English. This has been made particularly clear with the use of legal terms for the wide array of participation mechanisms. To mitigate any potential confusion, chapter 2 will start by defining each term clearly and provide a table of translation that will be applied consistently throughout the whole thesis.

## **1.4. Methodology**

This thesis applies three distinct methodologies: doctrinal research, case study analysis and empirical research through the conduction of interviews.

It follows a doctrinal legal approach to examine the text of the relevant Ecuadorian laws and the Escazú Agreement. The thesis will delve into the Agreement's text as a primary source as well as into sources from the Economic Committee for Latin America and the Caribbean and the Agreement's bodies. This will serve as the analysis of the obligations borne by the state parties to respect citizens' rights to participate in environmental decision-making.

A contextual approach is used to set the stage of the Escazú Agreement and analyse its history, objective approach, and main pillars. Additionally, the jurisprudence of the Ecuadorian constitutional court will be analysed. This way, -the following four sub-questions will be answered:

1. What is the right to participate and what are the different mechanisms and tools for citizens to exercise this right?
2. What is a popular consultation by citizen initiative in environmental matters and what are its specificities?
3. What is the legal regime regarding citizen initiatives in Ecuador?
4. What is the right to participate in environmental decision-making and how does the Escazú Agreement formulate it? What are state obligations concerning this right?

Secondly, the Yasuní popular consultation was chosen as a case study of a popular consultation by citizen initiative on environmental matters. It is a clear example of environmental popular consultation as the consultation regards the exploitation of (non-renewable) natural resources and is motivated by concerns about the environment. Furthermore, this case offers an opportunity to assess the current and potential contribution of the Escazú Agreement to the right of participation in environmental decision-making and, more largely, environmental democracy.

This analysis will answer the following sub-question:

5. What is the Yasuní PCCI?

To address above-mentioned limitations, a triangulated approach was adopted, incorporating input from legal experts and activists intimately involved in both the negotiation of the Escazú Agreement and the organization of the Yasuní PCCI. Interviews were conducted with these stakeholders, whose diverse backgrounds and roles provided nuanced perspectives. Structured around specific sub-questions, the interviews aimed to uncover the legal and procedural shortcomings of the Yasuní popular consultation within the framework of the Escazú Agreement's obligations. Additionally, they explored hypothetical scenarios wherein the Escazú Agreement was correctly applied, shedding light on potential improvements to such processes. Furthermore, the interviews delved into the anticipated benefits of the Escazú Agreement for future environmental PCCIs, identifying additional tools and approaches that it offers. The questionnaire may be found in Annex II.

Although they followed a structured set of sub-questions, the interviews allowed for spontaneity and tailoring to each interviewee's expertise. This flexibility led to variations in the questions and conversational flow. Nonetheless, the insights gathered from these interviews are regarded as integral to the study's methodology, standing alongside other utilized resources. They played a crucial role in deepening the understanding of the issues under investigation and their underlying contexts as they have made clear that these were crucial to provide for comprehensive answers. Indeed, law does not operate in a vacuum; rather, it can be considered as the crystallisation or reflection of the political and economic conditions and dynamics in which it is applied.



All interviews are listed in Annex I, alongside descriptions of each interviewee and are referred to by their number in citations (e.g. Interview 1).

These two latter methodologies thus contributed to the answering of following sub questions:

6. What were the (legal and procedural) shortcomings of the Yasuní PCCI in the light of the obligations imposed by the Escazú Agreement?
7. How would this case have been handled if the Escazú Agreement had been applied and implemented correctly?
8. In similar future cases of environmental PCCI, what will be the likely added value of the Escazú Agreement? What are the additional tools it provides for?

## **1.5. Outline of thesis**

After the introductory first chapter, the second chapter of the thesis will open with an analysis of the right to participate. It will explore the various mechanisms at hand to exercise this right and focus on the mechanism of PCCIs. It will do so by using the Ecuadorian legal regime as a concrete example.

The third chapter will analyse the Escazú Agreement itself, studying its origins, negotiation and ratification history, objective, approach, and main articles. This third chapter will serve as a general context to focus on article 7 that grants the right to participation in environmental decision-making. It will analyse the article and derive the obligations that Member States bear.

The fourth chapter will then address the Yasuní public consultation as an example of a PCCI on environmental matters. It will study its process, the challenges it faced, its organisation and its results.

The fifth chapter will interpret this case study through the application of the Escazú Agreement. Drawing from the perspectives and reflections offered by the interviewees, it will analyse through this lens in which ways the state of Ecuador failed in its obligations, how the consultation would

have gone if the Escazú Agreement would have been applied correctly and what additional tools the Escazú Agreement offers for a smoother organisation of such consultations.

The thesis will close with conclusive reflections on the added value of the Escazú Agreement for environmental democracy and the future of environmental PCCIs in Latin America as a means for enhance participation in environmental decision-making.

## **Chapter 2. The right to participate and the citizen initiative in environmental matters.**

This chapter will explore the right to participate in environmental decision making and the various mechanisms that exist to exercise this right. This general overview aims at locating the mechanism of the PCCI as an expression of this right, its specificities and how it is organized in a specific legal regime as well as its application in environmental matters.

It will do so by first, exploring the right to participate as a civil and political right. Then, it will categorize and list the main mechanisms to exercise this right. By doing so, it will introduce the definition of PCCI, differentiating it from other participation mechanisms. This chapter will use Ecuador's legal framework as a concrete example of how the rights to participation, its various mechanisms, and more specifically the PCCI, are organized.

This chapter will thereby answer the following sub-questions:

1. What is the right to participate and what are the different mechanisms and tools for citizens to exercise this right?
2. What is a popular consultation by citizen initiative in environmental matters and what are its specificities?
3. What is the legal regime regarding citizen initiatives in Ecuador?

### **2.1. The right to participate.**

As stated in section 1.1.2. , the right to participate, the right to information and the right to access to justice are commonly described as 'access' or 'procedural' rights.<sup>31</sup> It is important to note that these rights are interconnected: each one is necessary for the fulfilment of the others and a violation of one of them may affect the enjoyment of the others.<sup>32</sup> While the Escazú Agreement

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<sup>31</sup> Orellana 2016, p 51.; Moeckli 2022.

<sup>32</sup> ECLAC 2022, p 46.

applies them to environmental matters, these rights are part of the body of civil and political rights that allow people to be free and to take part in democratic politics.<sup>33</sup>

The right to participate, specifically, has been described as ‘taking part in power decisions affecting citizens and collectives in the public sphere’.<sup>34</sup> Moreover, the Inter-American Court of Human Rights has stated how this right includes a broad range of actions that citizens can undertake with the objective to intervene and have influence in public affairs.<sup>35</sup>

Citizens’ participation has been regarded as essential for the mere existence of a democracy as it shapes the democratic skills of citizens, educates them on public affairs and legitimises the political system, creating policies that enjoy wide support.<sup>36</sup>

## 2.2. Participation mechanisms

Legal systems worldwide ensure the right of their citizens to participate in various ways, and there are numerous possible ways to categorize these mechanisms. This thesis focuses on the PCCI as a direct democracy mechanism, to enhance environmental democracy. In doing so, it will differentiate between direct democracy participation mechanisms and public consultation participation mechanisms. The former merely aim at collecting information and opinions of the public, which are rarely binding, while the latter trigger an electoral process, with often, binding results.<sup>37</sup> A schematic overview of the discussed mechanisms, as well as their Spanish-English translations and- place in the Ecuadorian legal regime is presented in following table:

	Spanish	English	Ecuador legal regime
Public Consultation	Consulta previa, libre e informada	Prior, free and informed consultation	CRE 57.7
	Consulta prelegislativa	Prelegislative consultation	CRE 57.17
	Consulta ambiental	Environmental consultation	CRE 398
Direct Democracy	Referendums/plesbiscites	Referendums/plesbiscites	LOPC 5; 13
	Consulta popular por iniciativa ciudadana	Citizen initiative	LOPC 21
	Iniciativa popular normativa	Agenda setting	LOPC 6
	Revocatoria del mandato	Recall	LOPC25

<sup>33</sup> Klabbers 2023, p 120.

<sup>34</sup> Guerrero del Pozo and Yépez Idrovo 2021, p 186.

<sup>35</sup> Inter-American Court of Human Rights 2005, *Yatama vs. Nicaragua*, para. 196.

<sup>36</sup> Gellers and Jeffords 2018, p 102.

<sup>37</sup> Interview 4

### 2.2.1. Public consultation mechanisms

The general term of public consultation covers a wide range of procedures that share the common goal of collecting perspectives of citizens to inform policy making by the government.<sup>38</sup> The general dynamic of these public consultations is that decision-makers provide information on a certain policy, programme or project that is being envisioned, and the public is asked to provide their views on the matter. Decision-makers then contemplate the inputs, and their final report or decision explains how these inputs have been processed and included (or not).<sup>39</sup> Public consultation mechanisms have been thought of as a way of involving citizens, fostering their participation to enhance the legitimacy, quality, and efficiency of decision-making.<sup>40</sup>

Each procedure is unique in terms of who is being consulted and how the consulted public is convened to participate.<sup>41</sup> These procedures may include advisory committees, public hearings, public surveys, town hall meetings, workshops, study circles, citizen juries, roundtables etc.<sup>42</sup> Other examples include opinion polls, public inquiries or calls for submission on a specific proposal.<sup>43</sup>

As an illustration, the legal framework in Ecuador establishes three primary mechanisms for public consultation: prior, free, and informed consultation (*consulta previa, libre e informada*<sup>44</sup>), pre-legislative consultation (*consulta prelegislativa*<sup>45</sup>), and environmental consultation (*consulta ambiental*<sup>46</sup>). Each mechanism entails its own components, defined public, procedures, and outcomes.

The first two mechanisms are outlined in chapter four of the Constitution of the Republic of Ecuador (CRE), which addresses the 'rights of communities, peoples, and nationalities'. Articles 56 and 57 state that indigenous communities, peoples, and nationalities, as well as the Afro-

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<sup>38</sup> Catt and Murphy 2003, p 413.

<sup>39</sup> Ibid, p 416.

<sup>40</sup> Ibid, p 408.

<sup>41</sup> Ibid, p 409.

<sup>42</sup> Gellers and Jeffords, p 102.

<sup>43</sup> Catt and Murphy 2003, p 416.

<sup>44</sup> CRE art. 57.7

<sup>45</sup> CRE art. 57.17.

<sup>46</sup> CRE art. 398.

Ecuadorian and Montubio peoples, along with communes, are integral parts of the Ecuadorian state, which is singular and indivisible. Moreover, they are recognised as holders of collective rights delineated in the subsequent sections of the chapter.<sup>47</sup> Among these collective rights are the rights to prior, free, and informed consultation, as well as pre-legislative consultation.

The free, prior, and informed consultation is due in the situation of plans of prospection, exploitation and commercialization of non-renewable resources in the territory of communities that could be affected environmentally, socially and culturally.<sup>48</sup> This right is derived from the subscription to the International Labour Organization Convention 169, which mandates that governments secure the prior and informed consent of communities before making decisions that may impact them.<sup>49</sup> This consultation process does not acknowledge the need to gain consent of the affected populations.<sup>50</sup>

By contrast, the pre-legislative consultation is a procedure that takes place within the framework of a legal measure that can affect collective rights.<sup>51</sup>

Lastly, the environmental consultation operates in the case of a decision or authorization taken or given by the state that can affect the environment.<sup>52</sup> It is the affected community that is being consulted. In the case of a majority opposition, the state must justify its decision to carry out the proposed plan. In this mechanism, the state is the consulting body and bears a strong duty to provide information.<sup>53</sup>

### **2.2.2. Direct democracy mechanisms**

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<sup>47</sup> CRE arts. 56 and 57.

<sup>48</sup> Constitutional Court of Ecuador 2021, Caso No. 1149-19-JP/20, para. 267.

<sup>49</sup> Walter and Urkidi 2017, p 266.

<sup>50</sup> Ibid.

<sup>51</sup> CRE art. 57.17 ; Guerrero del Pozo and Yépez Idrovo 2021, p 204.

<sup>52</sup> CRE, art. 398 ; Constitutional Court of Ecuador 2021, case 1149-19-JP/20, para. 273.

<sup>53</sup> Guerrero del Pozo and Yépez Idrovo 2021, p 205.

As explained in the introduction of this chapter, direct democracy participatory mechanisms are characterized by the fact that they entail that citizens need to vote a certain issue or matter, and that the outcome of these votes often carries a binding effect.<sup>54</sup>

Various forms of direct democracy mechanisms are utilized across Latin America, and terminology within national constitutions may differ when referring to similar mechanisms. The International IDEA Handbook defines four main direct democracy mechanisms which are: referendums/plebiscites, citizen initiatives, agenda initiatives and recall.<sup>55</sup>

Referendums or plebiscites are initiated by public authorities (and in some cases by citizens too) that call for a vote on a particular issue, measure, or law. The results may be legally binding as determined by the law or constitution organizing it.<sup>56</sup>

Citizens' initiatives emanate from the public that can propose a political, constitutional, or legislative measure for which enough support (signatures) has been gathered. Similarly to referendums, the results of these initiatives may be legally binding, depending on the law under which they are organized.<sup>57</sup>

Lastly, agenda initiatives and recall procedures are both mechanisms by which respectively citizens can place a particular issue on the agenda of the legislative bodies or end the mandate of an elected official.<sup>58</sup>

### **2.2.3. Direct Democracy mechanisms in environmental matters of Latin America and Ecuador**

Since the early 90's, the use of mechanisms of direct democracy have been rising in Latin America.<sup>59</sup> In her study on their use in socio-environmental conflict, Tatiana Alarcón describes a

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<sup>54</sup> Interview 4.

<sup>55</sup> Beramendi et al 2008, p 9.

<sup>56</sup> Beramendi et al 2008, p 10.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Alarcón 2019, p 16.

rise in social movements, often rooted in farmer and indigenous communities, emerging with the aim to defend the environment against intensified extractive activities throughout the region.<sup>60</sup> She claims that 'instruments of direct democracy are strategic tools of social movements that reclaim the right of affected populations and indigenous peoples to participate, in empowering forms, in high-stake decisions that affect their territories, livelihoods and future'.<sup>61</sup> A noteworthy example is the rise the use of these mechanisms by civil society movements to protest mining projects since the early 2000's.<sup>62</sup>

This democratization tendency, at odds with the economic trend on intensifying extraction of mineral ores of the region can be explained by the socio-political history of Latin America.<sup>63</sup> Most countries have known decades of unrest and prolonged periods of military authoritarianism.<sup>64</sup> Feeding a general distrust in political institutions, many social movements have risen with new demands for democracy, resulting in left-wing parties taking over the power.<sup>65</sup> This resulted in 'bursts of constitutional reforms' to strengthen democratic institutions again.<sup>66</sup>

The case of Ecuador serves as a striking illustration, given its history of several decades of unstable governance and social upheaval. The emergence of various alliances and collectives rooted in indigenous and peasant communities paved the way for the creation of the new Alianza PAIS party and the election of President Rafael Correa in 2007.<sup>67</sup> During his tenure, Correa called for numerous referendums to facilitate the adoption of a new constitution to 'reset the state' and reflect the environmental and social demands of the Ecuadorian citizens.<sup>68</sup> Additionally, he strengthened participatory mechanism procedures with the aim to enhance legitimacy and to involve citizens in the policymaking process.<sup>69</sup> The PCCI was one of these mechanisms.

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<sup>60</sup> Ibid.

<sup>61</sup> Ibid, p 17.

<sup>62</sup> Walter and Urkidi 2017, p 265.

<sup>63</sup> Ibid.

<sup>64</sup> Barczak 2001, p 38.

<sup>65</sup> Faletti 2014, p 3.

<sup>66</sup> Barczak 2001, p 38.

<sup>67</sup> Interview 1.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.



### 2.3. The PCCI in the Ecuadorian legal regime

The legal regime on the PCCI can be found in three bodies of law, namely the Constitution of the Republic of Ecuador (CRE) the organic law on citizen participation (*Ley Organica de participación ciudadana*, or LOPC), and the organic law of jurisdictional guarantees and constitutional control (*Ley Organica de Garantias Jurisdiccionales y Control Constitucional* LOGJCC). Article 104 CRE uses the general term of ‘popular consultation’ that can be triggered by the President of the Republic, the decentralized autonomous governments, or by initiative of the citizens of Ecuador.<sup>70</sup> These actors can respectively call for a consultation on “matters deemed convenient”, “issues of interest for their jurisdiction” and “any matter”.<sup>71</sup> The result is that the citizens will pronounce themselves on the proposed issue, formulated as a/ various question(s) through an electoral process.<sup>72</sup>

The LOPC gives further details in its Title II “on direct democracy”, chapter 3 “of the popular consultation”. The chapter details the procedures regarding who organizes the popular consultation: the President<sup>73</sup>; the autonomous decentralized governments<sup>74</sup>; the National Assembly<sup>75</sup> and the citizens<sup>76</sup>. The latter thus being the PCCI.

The PCCI is organized by article 21, which reaffirms that citizens can request a popular consultation on any topic except on matters related to taxes, public expenditure, or the political and administrative organisation of the country.<sup>77</sup>

The procedure to organize a PCCI can be schematically summarized in the following steps:<sup>78</sup>

- The submission by the citizens of the request for a popular consultation.
- The prior ruling on constitutionality of the Constitutional Court.
- The verification of the democratic legitimacy of the initiative.

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<sup>70</sup> CRE art. 104.

<sup>71</sup> Ibid.

<sup>72</sup> Constitutional Court of Ecuador 2021, case 1149-19-JP/20, para. 268.

<sup>73</sup> LOPC art. 19.

<sup>74</sup> LOPC art. 20.

<sup>75</sup> LOPC art. 22.

<sup>76</sup> LOPC art. 21.

<sup>77</sup> LOPC art. 21.

<sup>78</sup> Peña Carpio 2011, p 40.

- The call to participate in the popular consultation by the National Electoral Congress (Consejo Nacional Electoral, CNE). According to articles 106 of the Constitution and 197 of the Code of Democracy, the CNE has 15 days to convene for the consultation and 60 days to carry it out. As a rule, the popular consultation is drafted as a question that can be answered by “yes” or “no”.
- The definition, publication and approval of the citizens that are expected to vote.
- The organization of the voting: the material preparation, selection and training of polling station members, installation of polling stations etc.
- The voting
- The proclamation of results

To have the PCCI organized, the citizens taking the initiative must comply with two requirements:

They first need to obtain a ruling of the Constitutional Court on the constitutionality of the question(s) that is/are proposed for the consultation.<sup>79</sup> In this analysis, the Court verifies that the freedom of the voter is being respected and that the content/proposal of the consultation is constitutional.<sup>80</sup>

Respecting the freedom of voter means that these are not being purposely misled or confused by the formulation of the consultation.<sup>81</sup> This means that each question of the consultation pertains to a single issue, which can be decided upon individually (no block approval or rejection). Additionally, the proposal should not establish exceptions benefitting a specific political project.<sup>82</sup>

The content and proposal of the consultation undergo a threefold analysis of constitutionality. This analysis includes the preamble of the consultation, the question itself, and the result of the consultation in the case of a favourable outcome.<sup>24</sup>

This analysis, if favourable, results in a prior and binding ruling of constitutionality on a call for a PCCI.<sup>83</sup> The organic law on jurisdictional guarantees and constitutional control (*Ley Organica de*

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<sup>79</sup> LOPC art. 21 ; LOGJCC arts.3E, 104, 105, 127 ; Reglamento de Sustanci3n de Procesos de Competencia de la Corte Constitucional, art. 85.

<sup>80</sup> LOGJCC, arts. 127, 61 ; CRE, art. 4.

<sup>81</sup> LOGJCC Articles75.3<sup>E</sup>, 104, 105, 127, Reglamento de Sustanci3n de Procesos de Competencia de la Corte Constitucional art. 85.

<sup>82</sup> Ibid.

<sup>83</sup> Martin 2011, p 24.

*Garantias Jurisdiccionales y Control Constitucional* or LOGJCCC) fleshes out the details of this constitutional analysis.

As a second requirement, the PCCI must gain support (signatures) of the voters of the electoral roll, according to the scope of the consultation. The minimum required supporting signatures that must be collected is either 5% or 10% of the registered voters, depending on whether the consultation is national or local in scope.<sup>84</sup>

Article 106 of the Constitution affirms the binding character of the result of the PCCI stating that 'the popular pronouncement shall be binding and immediately enforceable'.<sup>85</sup>

## **2.4. Intermediate Conclusion**

This chapter explored the right to participate as a civil and political right for citizens to exercise influence in public affairs and to be part of the decisions that will affect them. The various participation mechanisms can be divided into two main groups: consulting mechanisms and direct democracy mechanisms. Each group contains many different mechanisms, each unique in their procedure, the aimed public, and the effect the result of the procedure has. The main difference between both categories is that the direct democracy mechanisms require an electoral procedure, often resulting in a binding result, while the consultative procedures do not. The PCCI procedure is one of the direct democracy mechanisms, and consists in citizens proposing a measure which will be voted, with a binding result. This mechanism has known a rise in its use in Latin America, especially in environmental topics where citizens and communities use it to claim participation in the management of the natural resources. The PCCI is organized in the Ecuadorian Constitution and the organic law on citizen participation.

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<sup>84</sup> LOPC art. 21.

<sup>85</sup> CRE art. 106.

## **Chapter 3. The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean and the right to participate in environmental decision-making.**

Now that the right to participate and its main mechanisms have been analysed, this thesis will proceed to study how the Escazú Agreement formulates this right. To this end, it will first provide the context in which the Agreement was initiated, negotiated, and ratified. Then, it will briefly examine the agreements' objective, approach, structure, and key provisions. Afterwards, the chapter will delve into the specific provisions that grant the right to participation in environmental decision-making and what duties these impose on the members states. The following research question will be answered:

1. What is the right to participate in environmental decision-making and how does the Escazú Agreement formulate it? What are state obligations concerning this right?

### **3.1. History**

The negotiation of the Escazú Agreement has taken place amongst social, economic, and political tensions. The Agreement entered into force in a global context of the COVID-pandemic, threats of terrorism and a crisis of multilateralism that exposed the weaknesses of international organisations.<sup>86</sup>

During this period, there was also a noticeable impact from an outspoken global civil society that emphasized environmental issues and human rights.<sup>87</sup>

The regional context of Latin America and the Caribbean (LAC) is that of being one of the most biodiverse and multicultural regions of the world, being home to unique ecosystems such as the Amazon rainforest and populations belonging to more than 800 indigenous groups.<sup>88</sup> Meanwhile,

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<sup>86</sup> Rodriguez and Menezes 2023, p 86.

<sup>87</sup> Ibid.

<sup>88</sup> ECLAC 2023, p 62.

as mentioned in chapter 1, it is a region struck by political instability and the most dangerous one for environmental human right defenders fighting against (illegal) deforestation, contamination, and destruction.<sup>89</sup>

As briefly introduced in chapter 1, the Escazú Agreement was born out of the desire of LAC countries to further principle 10 of the Rio Declaration into their regional realities.<sup>90</sup> Principle 10 and the access rights it enshrines already had a long-lasting history, finding their origin in the 1948 Universal Declaration on Human Rights.<sup>91</sup>

A growing body of research and literature showed how, through transparency and inclusion (creating a “green public sphere”), implementing these access rights guarantees more robust environmental policies.<sup>92</sup> Many multilateral agreements, such as the Montreal Protocol (1987), the United Nations Convention to Combat Desertification (1994), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1983), the Basel Convention (1989) and the Ramsar Convention (1971), had already incorporated these access rights.<sup>93</sup>

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted under the auspices of the Economic Commission for Europe, was the first legally binding instrument that specifies these rights of the public and the obligations for states to give effective application of Principle 10.<sup>94</sup>

At the Rio+20 United Nations Conference on Sustainable Development in 2012, twenty years after the 1992 ‘Earth Summit’, the idea that environmental issues should be handled with participation of all citizens concerned was once again emphasized.<sup>95</sup> While a process to develop UN Sustainable

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<sup>89</sup> Global Witness, ‘Standing Firm. The Land and Environmental Defenders on the frontlines of the climate crisis’, <https://www.globalwitness.org/en/campaigns/environmental-activists/standing-firm/>. ; Rodriguez and Menezes 2023, p 87.

<sup>90</sup> Ibid, p 90.

<sup>91</sup> Parola 2013, p 65.

<sup>92</sup> Gellers and Jeffords 2018, p 100.

<sup>93</sup> Rodriguez and Menezes 2023, p 89.

<sup>94</sup> ECLAC 2022, p 63.

<sup>95</sup> ECLAC 2022, p 21.

Development Goals was launched, ten LAC countries signed the Declaration on the Implementation of Principle 10 of the Rio Declaration on Environment and Development.<sup>96</sup>

This initiative had been proposed by the Chilean government, which had just entered the Organisation for Economic Cooperation and Development and was looking to foster international cooperation, commitment and stability.<sup>97</sup> Chile, Costa Rica, Ecuador, Jamaica, Mexico, Panama, Paraguay, Peru, the Dominican Republic and Uruguay thus started the process of exploring the possibility to adopt a regional agreement, with the Economic Commission for Latin America and the Caribbean (ECLAC) that acted as secretariat.<sup>98</sup>

ECLAC played an active role in the negotiation of the Escazú Agreement as it supported the initiative from its early stages on, carried out a regional study of national situations during the negotiation process, and provided for the preliminary document that served as the basis for the final agreement.<sup>99</sup>

The Parties of the Declaration agreed upon a Plan of Action that stretched until 2014, setting the basis for 8 rounds of negotiations. These negotiations eventually led to the signing of the Escazú Agreement on March 4<sup>th</sup>, 2018, and its entry into force on April 22<sup>nd</sup>, 2021.

In April 2022, the first Conference of Parties (COP) took place, during which mostly its rules of procedure were approved.<sup>100</sup> Additionally, rules regarding the structure and functions of the Committee to support implementation and compliance were adopted.<sup>101</sup> Its Decision I/4 postponed to the next COP the discussion on financial provision necessary for the functioning and implementation of the Agreement, mentioned in article 15.4(b) of the Agreement.<sup>102</sup> Its decision I/6 creates an open-ended ad hoc working group on human rights defenders in environmental matters.<sup>103</sup>

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<sup>96</sup> United Nations, 'United Nations Conference on Sustainable Development, 20-22 June 2012, Rio de Janeiro', <https://www.un.org/en/conferences/environment/rio2012>. ; Rodriguez and Menezes 2023, p 87.

<sup>97</sup> Rodriguez and Menezes 2023, p 87.

<sup>98</sup> Menezes, p 90.

<sup>99</sup> Ibid.

<sup>100</sup> United Nations, 'First meeting of the Conference of the Parties to the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean decisions adopted, 2022.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid, decision, I/4.

<sup>103</sup> Ibid, decision I/6.

The Second COP, held in April 2023, limited itself to electing the members of the committee to support implementation and compliance.<sup>104</sup> COP 3, expected to take place in April 2024, will focus on the adoption of an action plan regarding environmental defenders.<sup>105</sup> Some members have published their implementation plans, but so far, no official agreement on a specific implementation timeframe has emerged.

Among them is Ecuador, which published a first evaluation regarding its compliance with environmental rights and an implementation route.<sup>106</sup> Chile, Mexico, Argentina, and some other states have been developing pilot programs for implementation of the Agreement.<sup>107</sup>

The Committee to support implementation and compliance has met twice so far, essentially fleshing out its working modalities.<sup>108</sup> The Committee has decided that it will operate on a non-punitive basis, establishing a mechanism by which it can receive complaints from member states and issue recommendations.<sup>109</sup> This Committee, along with the Presiding officers and ECLAC serving as the Secretariat, constitute the core entities of the Agreement, whose institutional framework is still largely under development.<sup>110</sup>

### **3.2. Objectives, approach, and main provisions**

This section will give a general overview of the agreement examining its objective, approach, and main provisions.

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<sup>104</sup> Second meeting of the Conference of the Parties to the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean decisions adopted, 2023.

<sup>105</sup> Interview 3.

<sup>106</sup> Ibid.

<sup>107</sup> Interview 4.

<sup>108</sup> ECLAC 2023, Second meeting of the Committee to Support Implementation and Compliance of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, minutes of the meeting.

<sup>109</sup> Interview 4.

<sup>110</sup> Ibid.

### 3.2.1. Objective

The Escazú Agreement voices its general objective as guaranteeing the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters in the Region; and creating and strengthening capacities and cooperation to contribute to the right to a healthy environment and to sustainable development of every person of present and future generations.<sup>111</sup>

The material scope of this objective focuses on furthering these access rights to contribute to the protection of the right to a healthy environment ('of every person of present and future generations').<sup>112</sup> This is achieved through the creation and strengthening of capacities and cooperation among member states. The Agreement also aims to contribute to the 2030 Agenda and the Sustainable Development Goals, especially SDG 16 ('promote peaceful and inclusive societies'). This would be done by guaranteeing equal access to information, participation, and justice.<sup>113</sup> The territorial scope of the objective remains within the states of LAC.<sup>114</sup>

### 3.2.2. Approach and main provisions.

Drawing from its objective and from the preface of the agreement, the Escazú Agreement can be defined as both an environmental and a human rights treaty.<sup>115</sup> Its approach is rights-based and with a strong focus on "leaving no one behind". This is understood as giving special attention to the specific interests and conditions of vulnerable communities and of human rights defenders in environmental matters.<sup>116</sup>

The state parties are responsible for fulfilling the legally binding obligations of the Agreements, while the primary beneficiaries of these rights is the public, defined as nationals or individuals

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<sup>111</sup> Escazú Agreement, art. 1.

<sup>112</sup> Ibid.

<sup>113</sup> ECLAC 2022, p 44.

<sup>114</sup> Ibid, p 66.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.



subject to the national jurisdictions of the state parties.<sup>117</sup> This deviates from 'classical' international law that regards only states as subjects of its rights and obligations.<sup>118</sup> In this sense, it could be stated that the Escazú Agreements forms part of the movement of international law that gradually also recognises individuals as subjects of international law, particularly in the branch of international human rights law.<sup>119</sup>

The Escazú Agreement follows customary international law concerning treaty law, as codified in the Vienna Convention on the Law of Treaties, regarding its implementation and its interpretation.<sup>120</sup> As affirmed by article 4.3 of the Agreement, state parties are expected to honour their commitments and to make the necessary implementation within their national legal orders.<sup>121</sup> The Agreement's implementation guide confirms the articles 31 to 33 VCLT apply and the Agreement's provisions need to be read in good faith, in accordance with the ordinary meaning, and in the light of the object and purpose of the Agreement.<sup>122</sup> The nature of each obligation varies according to the choice of wording that can indicate a strong obligation (shall), a recommendation (should) or a guidance (may).<sup>123</sup>

Article 2 of the Agreement lists and defines the key terms such as access rights, competent authority, environmental information, persons, or groups in vulnerable situations.<sup>124</sup> This last definition refers to those having difficulties to exercise the rights granted by the agreement. These can be different in every member state and the difficulties can relate to, among others, income, age, gender, language, geographical location, race, or ethnicity.<sup>125</sup>

Article 3 lists the principles on which the Agreement is based, including equality and non-discrimination, transparency and accountability, non-regression and progressive realization,

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<sup>117</sup> ECLAC 2022, p 29.

<sup>118</sup> Klabbers 2023, p. 71.

<sup>119</sup> Ibid, p. 119.

<sup>120</sup> Ibid, p 43.

<sup>121</sup> Ibid, p 35. ; Escazú Agreement, art. 4.3.

<sup>122</sup> ECLAC 2022, p 37.

<sup>123</sup> Ibid, p 67.

<sup>124</sup> Escazú Agreement, art. 2.

<sup>125</sup> ECLAC 2022, p 71.

prevention, precaution, intergenerational equity, maximum disclosure, and permanent sovereignty of the States over their natural resources.<sup>126</sup>

The remaining Agreement is structured by 5 main pillars: the right to access to environmental information; the right to participation in environmental decision-making; the right to access to justice; human rights defenders in environmental matters; and capacity building and cooperation.<sup>127</sup>

Furthermore, the agreement establishes tools and bodies to support the implementation and carrying out of the agreement. These include a clearing house<sup>128</sup>, a voluntary fund<sup>129</sup>, a conference of the parties<sup>130</sup>, a secretariat<sup>131</sup> and a committee to support implementation and compliance<sup>132</sup>. The agreement concludes with institutional provisions regarding national implementation<sup>133</sup>, right to vote<sup>134</sup>, and settlement of disputes<sup>135</sup>. Additionally, it regulates the way amendments can be made to its provisions<sup>136</sup> as well as its signature, entry into force, reservations, withdrawal, depositary, and authentic texts.<sup>137</sup>

### **3.3. The right to participate in environmental decision-making.**

Article 7 of the Escazú Agreement grants the right to participate in environmental decision-making. The first paragraph mandates all member states to guarantee “open and inclusive participation in environmental decision-making processes based on domestic and international normative frameworks<sup>138</sup>”.

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<sup>126</sup> Escazú Agreement, art. 3.

<sup>127</sup> ECLAC 2022, p 30.

<sup>128</sup> Escazú Agreement, art. 12.

<sup>129</sup> Ibid, art. 14.

<sup>130</sup> Ibid, art. 15.

<sup>131</sup> Ibid, art. 17.

<sup>132</sup> Ibid, art. 18.

<sup>133</sup> Ibid, art. 13.

<sup>134</sup> Ibid, art. 16.

<sup>135</sup> Ibid, art. 19.

<sup>136</sup> Ibid art. 20

<sup>137</sup> Ibid, arts. 21 to 26.

<sup>138</sup> Ibid, art. 7.

Article 7 identifies two different types of environmental decision-making in which citizens can participate: processes that grant environmental permits to projects that may have a significant impact on the environment, and other decision-making processes that relate to strategies, policies, programmes, rules and regulations on environmental issues and other matters of public interest.<sup>139</sup> Citizens can participate before, during and after the making of decisions.<sup>140</sup>

The 17 paragraphs of the article can be divided in three categories.<sup>141</sup> The first one regards every decision-making process and constitutes of paragraphs (para.) 1, 4-11, 14 and 15. These provisions set a standard for how member states should organize and carry out participation processes. The provisions mainly focus on appropriate timeframes and means of communication to ensure meaningful and inclusive participation.

Article 7, para. 14 mandates member states to facilitate participation ‘from the early stages onward’, even though the Agreement does not specify the exact timeframe for this requirement.<sup>142</sup> The implementation guide states that “the very nature of the public participation process demands that it takes place while all options are open<sup>143</sup>”. The guide also explains how adequate timeframes can depend on the group, and that member states need to adapt to the realities of each group to provide them with all needed information, enough time to participate meaningfully and to consider their observations.<sup>144</sup>

The obligation for States to give ‘due consideration’ to the input of citizens, does not imply any delegation of the power to make the decisions that lie with the states. The right to participate does not grant the public a ‘veto power’, nor does it entail “that the result of the public participation process is binding on the public authority”.<sup>145</sup> The public authority must consider the comments of the public and must stay open to the possibility that these may entail modifications or

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<sup>139</sup> ECLAC 2022 p 133.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Escazú Agreement, art. 7.14.

<sup>143</sup> ECLAC 2022 p 141.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

amendments to the project under scrutiny.<sup>146</sup> Lastly, the public authority is obliged to 'justify its decision, showing how and why a particular observation was accepted or rejected'.<sup>147</sup>

The second category of provisions regulates projects and activities that have a significant impact on the environment.<sup>148</sup> The term 'significant impact' has purposefully not been defined 'to cover a variety of existing domestic situations and enable each party to implement the provision according to its context'.<sup>149</sup> These provisions put a clear obligation on states to guarantee mechanisms of participation of the public directly affected by the project and activities and to inform them appropriately.

Para. 17 details what information shall be given to this specific public such as '(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'.

The third category of provisions includes the paragraphs 3, 12 and 13 and regards remaining decision-making processes of public interest. These pertain to the guarantee of participation in land-use planning, policies, strategies, plans, programmes, rules, regulations, and negotiations in environmental matters or with and environmental impact in national or international forums. In this category, the obligations seem more indicative as each paragraph states that parties shall promote or encourage participation and consultations in these spaces.<sup>150</sup>

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<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Escazú Agreement, art. 17, paras. 2, 16, and 17.

<sup>149</sup> ECLAC 2022, p 140.

<sup>150</sup> Ibid, p 141.

## Chapter 4. Case study of an environmental IPCC: The Yasuní popular consultation

This chapter contains the case study that applies the theory regarding IPCCs laid out in chapter 2 to a real-life case. This case will be the Yasuní popular consultation that took place in August 2023 in Ecuador.<sup>151</sup> The citizens went to the urns to cast their vote on a popular consultation convoked by the citizens collective “YASunidos” regarding the oil exploitation of the block 43 in the Yasuní National Park.<sup>152</sup> This section will analyse the origin and history of this consultation, as well as the (legal) steps that were taken for the consultation to be organized, and its results. This way, this chapter will answer the research sub-question:

1. What is the Yasuní PCCI?

### 4.1. Origin and history

The Yasuní National Park is one of the least deforested areas of the Amazon and most biodiverse places of the world as it hosts the highest documented number of amphibians and reptiles, alongside a spectacular amount of birds, trees and endangered species.<sup>153</sup> The region has been declared a Man and Biosphere Reserve by UNESCO and the park is also home to various uncontacted indigenous Waorani communities such as the Tagaeri and the Taromenane.<sup>154</sup> At the same time, it is the location of the ITT oil field.<sup>155</sup> International companies such as China National

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<sup>151</sup> The Guardian, ‘Ecuadorians vote to halt oil drilling in biodiverse Amazonian national park’, <https://www.theguardian.com/world/2023/aug/21/ecuador-votes-to-halt-oil-drilling-in-amazonian-biodiversity-hotspot>.

<sup>152</sup> Ibid.

<sup>153</sup> Martin 2011, p. 24.

<sup>154</sup> Martin 2011, p 24.

<sup>155</sup> Vallejo 2015, p 175.

Petroleum Corporation, China Petrochemical Corporation, the Spanish and Argentinian Repsol YPF and the Ecuadorian Petroecuador operate on the various oil blocks in the park.<sup>156</sup>

The natural biodiverse richness of Ecuador is at odds with its status of one of the biggest oil exporters worldwide.<sup>157</sup> Proponents of liberal and capitalist policies and representatives of oil-producing companies' interests have been clashing for a long time with environmental groups and affected communities resisting their activities.<sup>158</sup> This tension is tangible in the case of the Yasuní as the extraction activities put pressure on the environment, degrading ecosystems and affecting its inhabitants.<sup>159</sup>

Ecuador was already exploiting various oil wells in the Yasuní National Parc, which had led to the 'Amazonía por la Vida'-campaign, championed by various environmentalists, to protect the indigenous territories and limit the exploitation activities to a certain zone.<sup>160</sup>

Under the pressure of this campaign, in an attempt to answer the international call to respond to the climate crisis, president Rafael Correa launched the Yasuní ITT initiative in 2008.<sup>161</sup> The initiative proposed to leave approximately 846 million barrels of heavy crude oil lying in the Yasuní National Park underground.<sup>162</sup> Not exploiting this oil would result in significant economic losses, prompting the Ecuadorian government to propose that the international community would compensate for 50% of the estimated economic losses incurred. In exchange for Ecuador's environmental commitment, the initiative thus suggested that the international community cover half of the foregone economic benefits stemming from the oil's non-exploitation.<sup>163</sup> The idea behind this proposal was, based on the principle of common but differentiated responsibilities and respective capacities (CBDR-RC), to jointly avoid carbon emissions linked to oil extraction and to protect one of the most biodiverse parts of the planet.<sup>164</sup> The initiative was followed by intense

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<sup>156</sup> Martin 2011, p 24.

<sup>157</sup> Ibid.

<sup>158</sup> Mendoza, 2007, chapter 6, para. 6.

<sup>159</sup> Ibid, para. 20.

<sup>160</sup> Interview 2

<sup>161</sup> Martin 2011, p 22.

<sup>162</sup> Ibid.

<sup>163</sup> Vallejo 2015, p 175.

<sup>164</sup> Martin 2011, p 22.

years of negotiations, and various offerings were made, but no agreement was reached, and the initiative was abandoned.<sup>165</sup>

Anticipating the potential economic gains from exploiting the Yasuní, and in the absence of adequate compensation through the envisioned Yasuní ITT initiative for greater political and environmental benefits, the Ecuadorian president reverted to the original plan to extract the Yasuní oil. He thus urged the National Assembly to declare the oil exploitation of the Yasuní Park a matter of national interest. This aimed to address the constitutional prohibition against exploiting natural resources in protected- or designated 'untouchable zones' ('zona intangible'), like the areas of the envisioned new oil wells in the Yasuní National Park and to speed up the process of opening them.<sup>166</sup> In October 2013, the Assembly accepted the president's request, and authorized the exploitation of new oil blocks 31 and 43.<sup>167</sup> Block 43 was of particular concern for environmentalists, as it was supposed to be the largest oil well and it was feared that its exploitation would trigger a key chain reaction of further extraction activities.<sup>168</sup> This apprehension stemmed from the need for extensive new infrastructure, including mining material, and the construction of new roads to facilitate the transportation of equipment and personnel to its remote location. Such developments were feared to exacerbate environmental damage and spur the expansion of extraction efforts to maximize the use and benefits of the infrastructure set up for exploiting Block 43, potentially leading to the opening of additional smaller surrounding oil wells.<sup>169</sup>

It is in this context that the environmental organization YASunidos was born, as a collective of citizens, organisations, artists etc., with the goal of defending the Yasuní National Park and its indigenous peoples against oil exploitation.<sup>170</sup> They began to campaign for a popular consultation on the exploitation of these blocks.<sup>171</sup> The proposed question was: 'Do you agree with the

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<sup>165</sup> Narranjo 2020, p 131.

<sup>166</sup> CRE, art. 407; Vallejo 2015, p 181.

<sup>167</sup> Narranjo 2020, p 131.

<sup>168</sup> Interview 2.

<sup>169</sup> Interview 2.

<sup>170</sup> Vela-Almeda and Torres 2021, p 181. ; Interview 2

<sup>171</sup> Narranjo 2020, p 131.

government keeping the ITT crude oil, known as block 43, indefinitely in the ground?'.<sup>172</sup> Nonetheless the exploitation of the park did start in 2014.<sup>173</sup> Numerous criticisms have emerged since then regarding the mining technologies employed, the disregard for safety and environmental standards, and the neglect of the welfare of fauna, flora, and indigenous communities.<sup>174</sup>

## 4.2. Request for PCCI and (legal) procedure.

The YASunidos presented their request for a popular consultation before the National Electoral Council (Congreso Nacional Electoral CNE) and the Constitutional Court on 22nd of August 2013.<sup>175</sup>

Following the Ecuadorian legal procedure for PCCIs that has been described in section 2.3., the YASunidos collective had to comply with the two requirements for the PCCI to be organized:

- To obtain a prior and binding ruling of constitutionality on their call for a popular consultation.<sup>176</sup> This means that their proposal had to undergo the analysis of the Constitutional Court that would scrutinize the constitutionality of the initiative.
- Gather sufficient support for the initiative. As the YASunidos wanted to organize a nationwide popular consultation, they were legally obliged to collect the signatures of 5% of the voters of Ecuador.<sup>177</sup>

In this case the Constitutional Court held that the democratic legitimacy, which are the signatures showing sufficient support for the initiative, had to be revised first, before the analysis of constitutionality could be carried out.<sup>178</sup>

Hence, in April 2014, 757 623 supporting signatures were presented to the CNE.<sup>179</sup> While this surpassed the legal requirement of 584,000 signatures a significant portion of them were

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<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Constitutional Court of Ecuador, case 6-22-CP/23, para. 1.

<sup>176</sup> Martin 2011, p 24.

<sup>177</sup> Interview 2.

<sup>178</sup> Narváez Montenegro and Medina Jordán 2017, p 25.

<sup>179</sup> Vela Almeda and Torres 2021, p 181.



invalidated by the CNE.<sup>180</sup> Consequently, the democratic legitimacy requirement was not met, leading to the rejection of the request for organizing the popular consultation.<sup>181</sup> The invalidated signatures and the various actions of appeal and recount that followed will be more detailed in section 5.1.2.

In October 2022, the request of PCCI was accepted and opened in front of the Constitutional Court.<sup>182</sup> Representatives of the YASunidos appeared in front of the Court with a threefold request: a prior and binding ruling on the constitutionality of their initiative; to dictate precautionary measures to suspend the oil exploitation in the Yasuní meanwhile; and to convene a public hearing for the YASunidos to expose their arguments in favour of the organization of the consultation.<sup>183</sup>

During the requested hearing, which was granted on the 18th of April 2023, the YASunidos were represented by lawyer Ramiro Avila Santamaría.<sup>184</sup> He claimed the Constitutional Court and the NEC's breached due process and participatory rights, as well as the right to protest by asking for signatures before granting the analysis of constitutionality of the request, and by the subsequent denial of democratic legitimacy.<sup>185</sup> In his exposition of arguments he detailed how the initiative complied with formal and material requirements, emphasising the importance of the consultation for safeguarding the collective rights of indigenous peoples, the political rights of the citizens of Ecuador, and the rights for the fauna and flora to be protected.<sup>186</sup>

### **4.3. Prior and binding ruling on constitutionality**

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<sup>180</sup> The Guardian, 'Yasuni campaigners claim oil drilling petition results are being manipulated', <https://www.theguardian.com/environment/2014/apr/30/yasuni-campaigners-oil-drilling-petition-results-referendum>.

<sup>181</sup> Interview 2.

<sup>182</sup> Constitutional Court of Ecuador, case 6-22-CP/23, para. 6.

<sup>183</sup> Constitutional Court of Ecuador, case 6-22-CP/23, para. 17.

<sup>184</sup> Public audience in front of Constitutional Court: <https://www.corteconstitucional.gob.ec/audiencia-publica-caso-nro-6-22-co/>.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

Shortly after the hearing of the 18th of April 2023, the Constitutional Court accepted the case and proceeded to the analysis of constitutionality of the popular consultation requested by the YASunidos. On the 9th of May 2023 it rendered its binding ruling on the constitutionality of the request.<sup>187</sup> The Court applied the legal regime the Constitution provides for regarding public consultations. This section will provide an overview of the Court's ruling.

#### **4.3.1. Competence and democratic legitimacy**

The Court relies upon article 104 to identify citizens as legitimate holders of the right to request a popular consultation and upon articles 1 and 95 of the Constitution to emphasize the right to participate, the sovereignty of the citizenry and the principle of democracy, both in its representative and direct form.<sup>188</sup> Regarding democratic legitimacy, the Court makes a distinction between formal and material democratic legitimacy. The former refers to the capacity of standing and the latter to the support (signatures) a request for a popular consultation needs to be backed by.<sup>189</sup> It confirms that the YASunidos have the capacity to appear as applicants for a popular consultation and to request a prior ruling on the constitutionality of the requested consultation and thus confirms the formal democratic legitimacy of the YASundons.<sup>190</sup> It also affirms that the request originates from a collective citizen's initiative according to articles 11.1 and 95 of the Constitution and that its subject matter falls within the scope of such initiative as it regards the exploitation of non-renewable resources enshrined in article 407 of the Constitution.<sup>191</sup>

#### **4.3.2. Requests**

In the next part of the judgement, the Court summarizes the various requests of the YASunidos that are the following<sup>192</sup>:

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<sup>187</sup> Constitutional Court of Ecuador, case 6-22-CP/23.

<sup>188</sup> Ibid, para. 33.

<sup>189</sup> Ibid, para. 37.

<sup>190</sup> Ibid, para. 37.

<sup>191</sup> Ibid, para. 34.

<sup>192</sup> Ibid, para. 26.

- the revocation of the 2013 judgement that dismissed the request for the PCCI initially, deeming the signatures insufficient and thereby denying democratic legitimacy.
- the convening of a public hearing.
- the issuing of a favourable ruling on the constitutionality of the request of the popular consultation.
- the dictation of precautionary measures to suspend the initiation of any new exploitation activity in the ITT oil field.

The Court immediately rejects some of the requests, stating that its judgments are definitive and cannot be the object of a revocation, that the public hearing had already taken place on the 18th of April 2023, and that precautionary measures cannot apply in this case<sup>193</sup>

#### **4.3.3. Analysis of constitutionality of the request**

Following the legal regime outlined in section 2.3 of this thesis, the Court starts with analysing the preamble of the proposed consultation project. The preamble consists in two parts: one that quotes the Constitution regarding PCCIs and one giving information on the geographic scope of block 43. Applying art 104 LOGJCCC, the Court considers that both parts QSDfJ comply with its formal requirements as they do not induce voters to issue specific responses; they are in concordance with the subsequent question of the consultation; they employ a neutral, simple, and understandable language and they do not provide any unrelated information.<sup>194</sup>

Secondly, the Court tests the constitutionality of the question of the consultation which is the following: "Do you agree with the government keeping the ITT crude oil, known as block 43, indefinitely in the ground?". The Court analyses this question through the lens of article 105, numerals 1, 2, 3 LOGJCC which guarantee voter freedom. As there is only one question, which does not induce block approval or refusal, and does not allow for exceptions benefitting a specific political project, the Court concludes that the question complies with the formal requirements.<sup>195</sup>

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<sup>193</sup> Ibid, para. 39-43.

<sup>194</sup> Ibid, para. 53-56.

<sup>195</sup> Ibid, paras. 57-61.

Lastly, the Court analyses whether the result of the consultation, in the case of a favourable outcome, is constitutional. If the ‘yes’ of the Yasuní consultation would win, it would lead to the cessation of oil exploitation in block 43 in the Yasuní National Park. This means to leave millions of barrels of unexploited oil underground.<sup>196</sup> Article 105.4 of the Constitution requires that the outcome must have a certain legal effect.<sup>197</sup> The Court analyses the technical information provided by the company, Petroecuador, and concludes the voter has a certain way to anticipate the consequences of the possible outcomes of the consultation.

Nonetheless, the Court carries out an additional analysis on the matter of the consultation and on legal certainty. On the former issue, the Court clarifies that even if non-renewable natural resources are inscribed in article 1, para. 3 of the Constitution as the exclusive patrimony and competence of the State, article 408 of the Constitution says that every exploitation shall be carried out “in strict compliance with the environmental principles in the Constitution”.<sup>198</sup> It recalls its previous judgement in which it indicated that no constitutional provision prohibits citizens from raising questions related to the exploitation of non-renewable resources as a matter of public consultation.<sup>199</sup>

As regards legal certainty, the Court recalls that this is a right ‘based on respect for the Constitution and on the existence of prior, clear, and public legal norms applied by the competent authorities’<sup>200</sup>. In similar cases involving the potential halting of an economic activity, the Court had already ruled that the argument of legal certainty should not prohibit or limit citizens’ rights to participate or to be consulted.<sup>201</sup> The Court nonetheless analyses the legal certainty of contracts relating to the exploitation of block 43 for oil, which are divided in two categories: contracts related to oil pre-sale, and contracts of services and acquisitions of goods to carry out the exploitation. The Court states that although the exploitation of block 43 is necessary to honour these contracts,

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<sup>196</sup> Ibid, para. 68.

<sup>197</sup> Ibid, para. 70.

<sup>198</sup> Ibid, para. 74.

<sup>199</sup> Constitutional Court of Ecuador, opinion 9-19-CP/19, para. 21.

<sup>200</sup> Ibid, para. 78.

<sup>201</sup> Constitutional Court of Ecuador 2020, case 1-20-CP/20.

this is not a sufficient argument to prohibit the consultation if a favourable outcome is carried out in an 'ordinate and progressive' manner.<sup>202</sup>

Therefore, the Court deems it necessary for the consultation to include a one-year period from the notification of the result of the consultation to its implementation, should it have a positive outcome.<sup>203</sup>

Lastly, the Court also clarifies the obligations of the state of Ecuador in the case of such a positive outcome. These are: not to accept any further contractual relations for the (continued) exploitation of block 43, and to adopt immediate measures for the reparation of nature and the protection of the territory of the indigenous peoples in voluntary isolation.

The Court thus issued a favourable opinion on the introductory considerations, question, and measures of the requested consultation. This results in a binding ruling on the constitutionality of the PCCI under the condition that in the event of an affirmative pronouncement, the end of the exploitation activities shall be carried out in a progressive and orderly manner in a period not exceeding one year from the notification of the results.

The Court ended its judgement by ordering the proceedings for the public consultation to be carried out according to the Constitution and the Code of democracy, stating that the criteria of democratic legitimacy, was deemed to have been fulfilled both formal and material, and thus no more signatures need to be asked.

#### **4.4. Voting day and results**

The PCCI was held on the 20th of August 2023. According to the official results published by the CNE on the 31st of August 2023, the answer 'yes' to the question 'Do you agree with the government keeping the ITT crude oil, known as block 43, indefinitely in the ground?' won with 58,95%.<sup>204</sup>

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<sup>202</sup> Constitutional Court of Ecuador, case 6-22-CP/23, para. 89.

<sup>203</sup> Ibid, para. 90.

<sup>204</sup> NEC official website: [https://app01.cne.gob.ec/resultados2023\\_anticipadas](https://app01.cne.gob.ec/resultados2023_anticipadas).

At that time president Guillermo Lasso raised various concerns regarding the outcome of the consultation claiming that stopping the oil exploitation is 'suicide' and that it is 'impossible' to carry out the results.<sup>205</sup> A leaked video depicted the president affirming 'It is not possible to apply the Yes vote and we are going to maintain this position for as long as possible [...] We do not want oil production in Yasuní to end, for the moment we are not going to suspend anything'.<sup>206</sup>

In October 2023, Daniel Noboa was elected as the new president of Ecuador.<sup>207</sup> In the following months he made various claims that seemed to run counter to respecting the results of the consultation. A state of emergency was declared on January 8, and a declaration of internal armed conflict followed shortly after, due to various violent domestic incidents linked to drug cartels.<sup>208</sup> Noboa stated in an interview that a 'moratorium' on the implementation of the consultation's outcomes might be considered, citing the potential use of Yasuní oil in the 'war' against drug cartels.<sup>209</sup> The YASUNIDOS and the indigenous Amazon Waorani Nationality have demanded the government to respect the results of the consultation, but how and when exactly the results will be carried out remains vague and subordinate to political fluctuations.<sup>210</sup> Noboa is only meant to govern for 17 months to finish the term of Guillermo Lasso, who dissolved congress during an impeachment trial and called for presidential and legislative elections.<sup>211</sup> In these tense periods, where new elections are expected for early 2025 it is unlikely highly political topics such as the Yasuní consultation will be resolved.<sup>212</sup>

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<sup>205</sup> Primicias Redaction, 'Yasuní: El presidente Lasso dice que aplicar la consulta es "suicida" ', <https://www.primicias.ec/noticias/politica/presidente-lasso-aplicacion-consulta-yasuni/> .

<sup>206</sup> Mongabay, 'Consulta popular del Yasuní: crece preocupación por posibles incumplimientos del gobierno de Lasso', <https://es.mongabay.com/2023/09/consulta-popular-yasuni-possibles-incumplimientos-del-gobierno-de-lasso/>.

<sup>207</sup> The Guardian, 'Banana fortune heir Daniel Noboa wins Ecuador presidential election', <https://www.theguardian.com/world/2023/oct/16/daniel-noboa-wins-ecuador-presidential-election> .

<sup>208</sup> Amazon Watch, 'Despite Victory in Historic Referendum, Yasuní National Park is Again at Risk', <https://amazonwatch.org/news/2024/0130-despite-victory-in-a-historic-referendum-yasuni-national-park-is-again-at-risk> .

<sup>209</sup> Latin American Bureau, 'Yasuní National Park under threat once again', <https://lab.org.uk/yasuni-national-park-under-threat-once-again/> .

<sup>210</sup> Climate Change News, 'Ecuador's new president tries to wriggle out of oil drilling referendum', <https://www.climatechangenews.com/2024/02/08/ecuadors-new-president-oil-drilling-referendum-amazon-indigenous/> .

<sup>211</sup> The Guardian, 'Daniel Noboa wins Ecuador presidential election', <https://www.theguardian.com/world/2023/oct/16/daniel-noboa-wins-ecuador-presidential-election> .

<sup>212</sup> Interview 2.

As of the time of writing, the only concrete element that goes beyond political statements is the technical report on the impact of the closure of operations and abandonment of facilities in block 43 ITT published by the operation company, Petroecuador in August 2023.<sup>213</sup>

The report outlines three main lines of action, namely: the continuation with drilling activities until the end of 2023, the closure of production one year after the proclamation of the official results of the popular consultation and the preparation of an orderly and progressive “abandonment” program.<sup>214</sup>

The report specifies the continuation of drilling activities in the Ishpingo area until December 2023, including the opening of 15 more oil wells.<sup>215</sup> Moreover, a natural decline without any new investments or activities to continue the production will be carried out from January to September 2024.<sup>216</sup> The first of October 2024 would mark the closure of the ITT oil camp and 10 extra years would be needed for the total dismantlement of all infrastructures and the restoration of the environment, which leads to the year 2034 as the definitive end.<sup>217</sup>

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<sup>213</sup> Interview 2. ; Petroecuador, ‘Petroecuador, ‘Informe Técnico Impacto Por El Cierre De Operaciones Y Abandono De Instalaciones En El Bloque 43 Itt’, p 3..

<sup>214</sup> Petroecuador, ‘Petroecuador, ‘Informe Técnico Impacto Por El Cierre De Operaciones Y Abandono De Instalaciones En El Bloque 43 Itt’, p 3.

<sup>215</sup> Ibid, p 21.

<sup>216</sup> Ibid.

<sup>217</sup> Interview 2

## Chapter 5. Analysis of the Yasuní case through the lens of the Escazú Agreement

This chapter aims at providing an assessment of the Yasuní PCCI through the lens of the obligations of the state of Ecuador as a member state of the Escazú Agreement. The aim is to understand if, in its handling of the Yasuní PCCI, Ecuador has failed its obligations, specifically in terms of the right to participate in environmental decision-making, as enshrined in article 7 of the Agreement and if so, in what ways.

This analysis departs from the idea that, in the light of the general objective of the Escazú Agreement described in section 3.2, Ecuador, as a member state of the agreement, endorses the obligation to guarantee its objective, namely the access rights of its citizens to further their right to a healthy environment. As analysed in the same section, the Agreement requires the member states with adopting necessary national policies and laws to reach this objective.

On the first of October 2021 the government of Ecuador issued a document titled 'Process for the implementation of the Escazú Agreement'.<sup>218</sup> This was followed, in April 2023, by a second document presented as the implementation roadmap of the Escazú Agreement, drafted under the auspices of ECLAC.<sup>219</sup>

This last document defines its objective as establishing the priorities, timeframes, and actors to implement the Agreement.<sup>220</sup> It also emphasized how, since its ratification, the Agreement forms

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<sup>218</sup> Gobierno Abierto Ecuador, 'Proceso Para La Implementación Del Acuerdo De En Ecuador Escazú' [https://www.bivica.org/files/6330\\_Proceso%20para%20la%20implementaci%C3%B3n%20del%20Acuerdo%20de%20Escaz%C3%BA\\_jun22.pdf](https://www.bivica.org/files/6330_Proceso%20para%20la%20implementaci%C3%B3n%20del%20Acuerdo%20de%20Escaz%C3%BA_jun22.pdf).

<sup>219</sup> ELAC, 'Ruta para la implementación del Acuerdo Regional sobre el Acceso a la Información, la Participación Pública y el Acceso a la Justicia en Asuntos Ambientales en América Latina y el Caribe en el Ecuador' <https://repositorio.cepal.org/server/api/core/bitstreams/e1d3dc8d-6bdf-44ed-899c-282b4debe517/content>.

<sup>220</sup> ECLAC, 2023, p 10.



integral part of the Ecuadorian legal order, complementing the existing normative framework, and having direct application effect.<sup>221</sup>

For its analysis, this chapter will first examine the articulation between the right to participate as understood by article 7 of the Escazú Agreement, on one hand, and as used by the citizens in the Yasuní PCCI, on the other hand.

Once that relation is established, the shortcomings of the State of Ecuador will be identified and established regarding its obligation to guarantee the participation of its citizens in environmental matters.

Lastly, this chapter will draw the lessons of the Yasuní PCCI in terms of what can be deduced about the implementation of the Escazú Agreement in Ecuador.

By doing so, it will reply to following sub-questions:

5. What were the (legal and procedural) shortcomings of the Yasuní PCCI in the light of the obligations imposed by the Escazú Agreement?
6. How would this case have been handled if the Escazú Agreement had been applied and implemented correctly?

## **5.1. The right to participate in environmental decision-making: the relationship between the Escazú Agreement and the Yasuní PCCI**

It is amid the whole procedure of the YASunidos in front of the Constitutional Court described in chapter 4 that Ecuador ratified the Escazú Agreement on the 21<sup>st</sup> of May 2020. The agreement entered into force on the 22<sup>nd</sup> of April 2021.<sup>222</sup> This added another layer to the already existing international guarantees of access rights.<sup>223</sup>

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<sup>221</sup> ECLAC, 2023, p 11.

<sup>222</sup> UN Observatory on Principle 10 in Latin America and the Caribbean, <https://observatoriop10.cepal.org/en/treaty/regional-agreement-access-information-public-participation-and-justice-environmental-matters>.

<sup>223</sup> Interview 3

Before analysing in detail what obligations the state of Ecuador would allegedly have violated, it is important to understand the relationship between the Escazú Agreement and the Yasuní PCCI. The distinction between public consultation and direct democracy mechanisms made in section 2.2. proves useful to this.

Upon close examination of Article 7 of the Escazú Agreement, its provisions appear to align more closely with the former type of mechanisms rather than the latter. For instance, para. 2 focuses on ‘mechanisms for the participation of the public in decision-making processes, revisions, re-examinations, or updates related to projects and activities, and in other processes for granting environmental permits that have or may have a significant impact on the environment, including those that may affect health’.<sup>224</sup> Similarly, para. 3 mandates the inclusion of citizens in land-use planning, policies, strategies, plans, programs, rules, and regulations that may significantly impact the environment. These paragraphs suggest mechanisms that are more consultative in nature rather than those of direct democracy as they do not make any reference to the electoral process bound to the latter type of mechanisms.

This observation is further supported by para. 4 and para. 7, which stress the need to give proper attention to public feedback and the results of participation processes, respectively. Additionally, para. 8 underscores the obligation of parties to inform the public of their final decisions, providing justification for the consideration or dismissal of the given observations.

The above-mentioned implementation roadmap also states that the right to participate in environmental decision-making is enshrined in the Constitution of Ecuador, mentioning the consultation mechanisms presented in section 2.2.1 (the prelegislative consultation, the prior, free and informed consultation, and the environmental consultation).<sup>225</sup> The implementation guide states that ‘all of these manifestations of the right to public participation in environmental matters recognised in Ecuadorian law are in line with the right to participation recognised in the Escazú Agreement, although this international instrument includes more specific language regarding

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<sup>224</sup> Escazú Agreement, art. 7, para. 2.

<sup>225</sup> CEPAL 2023, p 21.

environmental decision-making processes'.<sup>226</sup> The implementation roadmap recognises that, even though the standards set by the Escazú Agreement regarding the right to participate can already be considered as part of Ecuador's secondary norms, it is important Ecuador adopts new laws to accommodate this right fully.<sup>227</sup> It draws special attention to the fact that environmental policies need to strengthen these consultative processes with the Agreement's standards.<sup>228</sup> The document states this must be done specifically regarding adequate timeframes for citizens to give observations, for those observations to have a chance to be implemented and for all vulnerable and marginalized groups to be included in the process.<sup>229</sup>

Arguably, taken together, these elements seem to align more with the consultative, non-binding, and non-electoral nature of consultative mechanisms. The Escazú Agreement appears to be involved with processes of environmental regulations and the construction of environmental policies, giving special attention to who should be consulted and in what way.<sup>230</sup> We could conclude from the that its article 7, and its understanding of participation in environmental matters, has little relevance to direct democracy initiatives such as PCCIs like the Yasuní consultation.

Nevertheless, while the Escazú Agreement does not explicitly address PCCI, it establishes a benchmark for meaningful participation, transparency, provision of information to citizens, and consideration for their inputs. It is crucial to remember the overarching objective of the Agreement, which centres around environmental protection and access rights. It also cannot be forgotten that regarding the articulation of international and national law regarding human rights, it is always the norm guaranteeing the greatest protection that should be given priority and application.<sup>231</sup> In our analysis of the actions of Ecuador in the Yasuní PCCI, it is in this light that they must be evaluated to identify potential shortcomings.

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<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

<sup>230</sup> Interview 4.

<sup>231</sup> Interview 3.

## 5.2. Shortcomings of the state of Ecuador for the right to participate of its citizens.

Three key moments and decisions taken by the state of Ecuador can be identified as potential shortcomings in the light of its obligations described above. These are the following:

- Imposing the YASunidos to prove democratic legitimacy for their initiative before allowing access to the Constitutional Court for the constitutional analysis of the initiative.
- Invalidating numerous valid signatures collected and presented by the YASunidos, thus rejecting the initiative.
- Casting doubt on the obligatory nature of the consultation and delaying the implementation of its outcomes.

The following sections will analyse each of these key moments, establishing whether they constitute shortcomings or not.

### 5.1.1 Inversion of the procedure

The YASunidos were asked to first collect the signatures to prove the required democratic legitimacy of their initiative to organize a popular consultation.<sup>232</sup> This was in contradiction with the steps for the organization of a PCCI exposed in section 2.3 where the request for a PCCI first undergoes a prior ruling on constitutionality. It is only once this ruling is obtained that the initiative moves to the next step where the citizens at the origin of the initiative need to prove sufficient support, and thus the democratic legitimacy of their initiative. The YASunidos still decided to accept this inversion and to collect the signatures as a political strategy to gather support for their movement.<sup>233</sup> They did so to avoid the initiative to stall but kept denouncing the fact that asking signatures first was a political trap to slow down the procedure.<sup>234</sup>

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<sup>232</sup> Interview 2.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

It has been argued that no legal explanation is to be found for this inversion of procedure, but rather political and economic motives, explained further in section 5.3.<sup>235</sup>

### **5.1.2. A delayed acceptance of the democratic legitimacy**

As exposed in section 4.2, out of 753 623 signatures initially presented to the CNE, only 369,114 were deemed valid, resulting in the rejection of the YASunidos' initiative by the Constitutional Court on February 12, 2015, for not complying with the democratic legitimacy requirement.<sup>236</sup>

This led to the YASunidos alleging fraud and appealing the decision, prompting the CNE to establish a Commission to conduct an independent audit of the signature counting process.<sup>237</sup>

In 2018 this Commission presented its report and in 2019 the Transitory Council for Citizen Participation and Social Control requested the CNE to accept the PCCI request deemed to comply with the democratic legitimacy.<sup>238</sup>

In 2019 The CNE rejected this request, leading the YASunidos to challenge this resolution before the Electoral Dispute Tribunal.<sup>239</sup> The Tribunal rejected the appeal, prompting the YASunidos to file an extraordinary action for protection against this verdict.<sup>240</sup> A series of judgments issued by the CNE, the Electoral Dispute Tribunal, and the Constitutional Court followed.<sup>241</sup> During this process, the Electoral Disputes Tribunal issued a resolution ordering the recount of the signatures.<sup>242</sup> This led to the discovering of signatures that has been discarded unlawfully. This resulted in the CNE granting the request its democratic legitimacy and the case to be forwarded

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<sup>235</sup> Interview 1

<sup>236</sup> Constitutional Court of Ecuador, case 6-22-CP/23, p 1-4.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid, para. 6.

to the Constitutional Court for the analysis of the initiative's constitutionality on September 27, 2022.<sup>243</sup>

While signatures can be discarded for various legal reasons (minors of age signing, incorrect or duplicated signatures, etc.), still various concerns and voices were raised regarding the legality of the dismissed signatures.<sup>244</sup> The CNE alleged the presence of repeated and incorrect signatures as a motive for them being discarded, but various voices were raised, speculation over improper and fraudulent actions on the part of the CNE.<sup>245</sup> These suspicions were comforted by presidents Correas' statements in the period before the count of signatures, stating that the YASunidos would never win and that the signatures would not be validated.<sup>246</sup>

In can, in either way be stated that this whole process delayed the progression of the case of the initiative with more than 5 years, which raises questions regarding due process and the right of participation of the citizens of Ecuador that had signed for the initiative.<sup>247</sup>

### 5.1.3. Implementation of the results

As noted in section 4.4., both former and current presidents, Guillermo Lasso and Daniel Noboa, respectively, have issued statements raising doubts about the implementation of the results, citing various legal arguments. Various authorities have also called upon a moratorium on the consultation's results.<sup>248</sup>

It could be argued that we are still in early days since the results of the PCCI. Ecuador is currently going through political tense time with a state of emergency and an upcoming election period which could be legitimate factors for the fact that no clear action has been undertaken yet. Still,

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<sup>243</sup> Ibid

<sup>244</sup> Interview 4

<sup>245</sup> Global Alliance for the Rights of Nature, 'Yasuní case verdict – International Rights of Nature Tribunal', <https://www.garn.org/verdict-yasuni-august-2014/>.

<sup>246</sup> The Guardian, 'Ecuador rejects petition oil drilling Yasuní', [https://www.theguardian.com/environment/2014/may/08/ecuador-rejects-petition-oil-drilling-yasuni?CMP=tw\\_t\\_gu](https://www.theguardian.com/environment/2014/may/08/ecuador-rejects-petition-oil-drilling-yasuni?CMP=tw_t_gu).

<sup>247</sup> Interview 4

<sup>248</sup> Interview 2

eight months of the one-year timeframe granted by the CC to carry out the results of the PCCI have passed. Arguably, it could be stated that using political motives for not implementing the results, can be interpreted as illegitimately challenging the binding nature of the PCCI as mandated by the Constitution.

#### **5.2.4. Conclusion on the shortcomings of the state of Ecuador**

All of these elements sum up to argue that the actions of Ecuadorian authorities throughout the Yasuní popular consultation process, were not aligned with the standards of meaningful, and swift citizen participation laid out in its own national frameworks, and furthered by the Escazú Agreement.<sup>249</sup> It has, in fact, been stated that, the above-mentioned violations of constitutional and legal guarantees of rights had become even more blatant with the entry into force of the Escazú Agreement.<sup>250</sup>

In an ideal scenario, motivated by environmental concerns to preserve the Yasuní National Park, the initiative would not have faced such illegitimate changes in procedure or delays, and its outcomes would have been promptly implemented, leading to the cessation of environmental damage caused by the oil exploitation.<sup>251</sup> Besides violating the constitutional rights of Ecuadorian citizens, the delays resulting from administrative and legal obstacles only prolonged the environmental harm, which also counters the general objective of the Escazú Agreement of protecting the environment for present and future generations.<sup>252</sup> Altogether these observations ultimately bring into light a certain breach of the Ecuadorian authorities of the aims and standards of the Escazú Agreement.

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<sup>249</sup> Interview 3

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

### 5.3. Lessons from the Yasuní PCCI: the implementation of the Escazú Agreement in Ecuador

The conducted interviews were unanimous in their analysis that from a legal point of view, it was difficult to explain the established breaches on the part of the Ecuadorian authorities in their handling of the Yasuní PCCI. More so, were the explanations to be found in the political and economic context in which this consultation took place.

This section will briefly provide some of these insights. Understanding the interactions between the law and other societal factors may shed light on how these are at play when it comes to its implementation. This will help gain perspectives on the implementation of the Escazú Agreement in Ecuador.

#### 5.3.1 Ecuador as a petrostate

In the international division of labour, Ecuador holds a place as provider of raw material, and especially oil, to fuel the global capitalist market.<sup>253</sup> The early 2000's have been marked by a proliferation of extractive activities as main driver for the development of the country, incentivized by favourable prices for oil on the global market.<sup>254</sup> Under Rafael Correa's presidency, many oil companies were nationalized and Ecuador signed many contracts with private companies for exploration and exploitation activities that have become the main income of the country.<sup>255</sup>

Additionally, on top of the formal economic interests of the oil industry, it has been claimed that these activities are also supporting a parallel 'informal' industry linked to criminal operations and many corruption cases.<sup>256</sup>

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<sup>253</sup> Interview 1.

<sup>254</sup> Ibid.

<sup>255</sup> Ibid.

<sup>256</sup> Interview 2.



These economic interests, and the underlying “path dependency” lie at odds with the progressive new Constitution instituted by the same Rafael Correa, that introduced provisions for enhanced environmental protection and direct democracy.<sup>257</sup> Ecuador is the first country that has adopted the Rights of Nature (recognizing its ecosystems have rights of their own) in its Constitution, which is illustrative for a certain level of environmental awareness and care for nature that reflect the collective consciousness of the Ecuadorian public.<sup>258</sup> This trend corresponds with the increasing utilization of direct democracy mechanisms by citizens to express their dissatisfaction with environmental management, particularly concerning the adverse effects of oil exploitation.

The Yasuní consultation is the illustration *par excellence* of the confluence of these three trends: the rise in exploitation activities; the enhanced environmental awareness, and the use of direct democracy mechanisms. One of the interviewees stated that the Yasuní consultation had ‘become a utopian scenario that allowed us to clearly put in contrast two models: one that thinks about nature and the other that thinks about the economy, without paying attention to the environment’.<sup>259</sup>

This global entrenched reliance on oil production and consumption thus clearly impedes, not only on the execution of environmental direct democracy efforts such as the Yasuní IPCC, but also on the way of establishing a robust and trustworthy framework for the implementation of human and environmental rights agreements such as the Escazú Agreement. As long as this global capitalistic system is not called into question and revised, citizens’ capacity to have their environmental concerns addressed, will stay confined in an ideological, yet unrealistic and impractical straitjacket.

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<sup>257</sup> Interview 1.

<sup>258</sup> Interview 2.

<sup>259</sup> Ibid.

### 5.3.2. Political will and gaps and asymmetries

The interviewees drew the attention to the fact that these economic interests have shaped the power relations at play within the Ecuadorian authorities.<sup>260</sup> They stated that no legal barrier could have impeded the democratic exercise of the Yasuní consultation, but that it was just a matter of political will.<sup>261</sup> This will had been reflected by the composition of the institutions involved with the process of accepting, organizing and processing the results of the Yasuni consultation.<sup>262</sup> President Correa has been described as having effectively stacked the Constitutional Court, the CNE, and the Congress with members from his party, ensuring the furthering of his agenda regarding oil exploitation.<sup>263</sup> The invalidation of signatures collected by the Yasunidos is an illustration as a battle for legitimacy, with the government leveraging its influence over the review and authentication process.

Actual implementation of the Escazú Agreement thus also requires transparent, impartial, and democratic institutions that further the internationally agreed agenda of human and environmental rights.

This lack of political will is also reflected by the gaps and asymmetries between the implementation and the rights guaranteed.<sup>264</sup> The progressive Constitution of Ecuador, with its ambitious stipulations regarding environmental protection and participation mechanisms, necessitates a comprehensive and cohesive administrative, political, and legal framework. It can be argued that Ecuador has yet to establish such a framework. Therefore, the shortcomings of Ecuadorian authorities can be associated with a deficiency in capacity, structure, and knowledge to effectively uphold these rights.<sup>265</sup>

It is clear, the Escazú Agreement's implementation will only stand firm if political will can be gathered to effectively address these gaps and asymmetries.

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<sup>260</sup> Ibid.

<sup>261</sup> Interview 1.

<sup>262</sup> Interview 2.

<sup>263</sup> Interview 3.

<sup>264</sup> Interview 3.

<sup>265</sup> Ibid.

## **Chapter 6. Conclusions. The added value of the Escazú Agreement to citizen participation and the future of IPCCs in Latin America and the Caribbean**

This chapter will draw the final conclusions on what lesson can be taken from the Yasuní IPCC case regarding the Escazú Agreement, its contribution to the right to participate in environmental decision-making, and environmental democracy. It will aim at evaluation what the added value is of the Escazú Agreement for Ecuador, and for the countries of LAC in general, both for future IPCCs and for environmental democracy. This way, the chapter will answer following sub-question:

8. In similar future cases of environmental PCCI, what will be the likely added value of the Escazú Agreement? What are the additional tools it provides for?

### **6.1. The added value of the Escazú Agreement for Ecuador**

It has been argued that for a country with such progressive Constitution such as Ecuador, the Escazú Agreement has little to nothing to add.<sup>266</sup> Moreso, has the Agreement been called by some as 'regressive', as it provides for less detailed content than the Ecuadorian laws and constitutions already provide for.<sup>267</sup> The example was given of the Ecuadorian Ley Orgánica de la Defensoria del Pueblo that grants more specific and detailed rights to environmental defenders than Escazú does.<sup>268</sup> A more nuanced perspective could argue that the Escazú Agreement comes as a normative reinforcement of these already established environmental rights standards.<sup>269</sup>

This reinforcement can also prove useful and can serve as an extra legal argument for citizens and lawyers in cases such as the Yasuní IPCC where confrontation with the authorities exist.<sup>270</sup> Seen the current context of Ecuador and the questionable implementation of the results of the Yasuní

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<sup>266</sup> Interview 1 and 2.

<sup>267</sup> Ibid.

<sup>268</sup> Interview 2.

<sup>269</sup> Interview 3.

<sup>270</sup> Interview 1.

PCCI, a future litigation case cannot be excluded.<sup>271</sup> Escazú has already served as argument in various litigation cases and can thus serve as an extra tool for citizens and lawyers to defend their access rights.<sup>272</sup>

## 6.2. The added value of the Escazú Agreement for LACs' environmental democracy

Ecuador features a particular progressive Constitution. In the case of other countries of the region, where poor regulation exists regarding access rights, the Escazú Agreement offers a framework for improvement.<sup>273</sup> Escazú serves as a guide to build or improve access rights laws and gives a minimum standard of what states of LAC should provide for.<sup>274</sup> It can be argued that for the LAC region in general, the Escazú Agreement levels the playfield on access rights and created an important regional moment to address the region's environmental and social struggles.<sup>275</sup>

The consultative mechanisms in environmental matters enshrined in the Agreement have largely emerged in the various legal systems of the region of LAC.<sup>276</sup> Still, citizens have experienced the limits of these mechanisms as rules defining the public that has to be consulted can be quite restrictive and the outcome of the consultation can be disregarded. These consultation mechanisms also have the drawback that they generally only concern directly affected citizens. They do not take into account the fact that a local environmental impact, resulting from a specific mining or oil project such as was the case for the Yasuní, can entail cumulative impacts or affect other regions and living beings elsewhere (environmental cumulative impacts).<sup>277</sup>

Facing these limitations, citizens have turned to the direct democracy mechanisms they have at hand. The Yasuní IPCC case is the result of the Constitution of Ecuador that grants some of the

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<sup>271</sup> Ibid.

<sup>272</sup> Ibid.

<sup>273</sup> Interview 2.

<sup>274</sup> Interview 3.

<sup>275</sup> Interview 2.

<sup>276</sup> Interview 3.

<sup>277</sup> Interview 3.

most progressive rights in terms of participation and environmental protection worldwide.<sup>278</sup> It is one of the most prominent examples of environmental popular consultations and of an environment direct democracy effort.<sup>279</sup> This tendency has been noted for several countries in LAC, where citizens use their rights to supplement themselves as a new branch of power, with the classical trio of executive, judicial and legislative powers.<sup>280</sup> They use these mechanisms when no other way was found to gain influence on their governments' decisions.<sup>281</sup> These developments lead to a new paradigm where the public stands central and uses direct democracy tools to directly influence their countries' policies.

As established in section 5.1 the Escazú Agreement doesn't concern itself directly with these direct democracy mechanisms. In fact, it could be stated that the Escazú Agreement offers a preventive scheme: it avoids direct democracy mechanisms by strengthening the consultation mechanisms.<sup>282</sup> The argument behind this logic is that, if citizens are included in environmental decision-making from the very start by effectively being informed, enabling them to meaningfully participate and being taken into account, they will not feel excluded anymore, taking away their incentive to trigger direct democracy mechanisms to make themselves be heard.<sup>283</sup> Escazú thus aims at avoiding political frustration and confrontation between the citizens of LAC and their governments.

Still, it can arguably be stated that a genuine environmental democracy, as outlined in chapter 1, requires more than just robust consultation mechanisms. It necessitates empowered citizens that do not only serve as consultants, but also as full-fledged actors of their societies and environments, actively participating in their management and safeguarding.

The Escazú Agreement still needs to grow in terms of its institutional architecture, and even more so in its implementation.<sup>284</sup> While it offers an addition to the growing ecosystem of environmental and human rights norms, it is a process under construction that might gain in impact with time.<sup>285</sup>

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<sup>278</sup> Interview 1.

<sup>279</sup> Interview 2.

<sup>280</sup> Interview 1.

<sup>281</sup> Interview 4.

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid.*

<sup>284</sup> Interview 1.

<sup>285</sup> Interview 4.

The agreement itself proposes a very progressive approach, implying that its provisions must be put to use according to the capacities of the parties.<sup>286</sup> A clear example of this are the periodic reports on the state of the environment the Agreement calls for. Currently Ecuador struggles to find adequate capacities and resources to organise these, while countries like Costa Rica, Mexico and Chile already have booked significant advances on this topic.<sup>287</sup>

It is, on the other hand, certain that many elements of the Agreement can already be achieved, but that they depend more on political will.<sup>288</sup> It is therefore, especially important that the spaces for the further negotiation and implementation of the agreement are strengthened with civil society actors, academics, activists, human rights defenders, NGOs, and associations, that will keep their authorities accountable for their commitments.<sup>289</sup>

Escazú has thus already generated considerable expectations that remain to be tested.<sup>290</sup> It can be conceded that its furthering of the Rio principle 10, making access rights more operational, bears the potential to equip citizens with better information, stronger participation mechanisms and access to justice in case these rights are breached.

Still, as the Yasuní IPCC has showed, these legal developments are embedded in a greater constellation of political, social, and economic factors that shape our world. These must be challenged if an international environmental and human rights agreement such the Escazú Agreement aims at having its provisions realistically put into practice. It is the capitalistic, extractive and corruption dynamics that must be pierced so future environmental PCCIs can truly honour the citizens exercise of their participation rights. Only this way can the Escazú Agreement mark a step towards effective environmental democracy where robust consultation schemes and direct democracy mechanisms work hand-in-hand for informed and enabled citizens who are involved and considered in the care of the ecosystems of Latin America. This way, responsible legal and political systems that truly lie at the service of all living beings and their future can be built and the

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<sup>286</sup> Ibid.

<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

<sup>289</sup> Interview 3.

<sup>290</sup> Interview 4.

*sumac kaway* ('buen vivir' or 'good living'<sup>291</sup>) as described in the Constitution of Ecuador can be achieved.

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<sup>291</sup> The Guardian, 'Buen vivir: the social philosophy inspiring movements in South America', <https://www.theguardian.com/sustainable-business/blog/buen-vivir-philosophy-south-america-eduardo-gudynas>.

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## Annex I. Interviews

Interview 1. Juan Auz Vaca. Ecuadorian lawyer and a Postdoctoral Researcher at the Public Law & Governance Department at Tilburg Law School.

Interview 2. Esperanza Martínez. Ecuadorian biologist and member of the YASundos collective.

Interview 3. Javier Ruiz. Mexican lawyer at Earth Law.

Interview 4. Daniel Barragán. Ecuadorian professor and researcher at Universidad Hemisferios. Involved in Ecuador's negotiation and implementation processes of the Escazú Agreement

## Annex II. Questionnaire

1. What can you tell us about the phenomenon of public consultations on environmental issues in Ecuador? Is it a phenomenon that has grown, and how does it relate to the new Constitution of 2008?
2. Why did it take 10 years for the Yasunidos to have their application approved by the Constitutional Court, and can this be considered a violation of the right to citizen participation?
3. What were the (legal and procedural) shortcomings of the Yasuní public consultation in the light of the obligations imposed by the Escazú Agreement?
4. How would this case have been handled if the Escazú Agreement had been applied and implemented correctly?
5. In similar future cases of environmental public consultations, what will be the likely added value of the Escazú Agreement? What are the additional tools it provides for? What differences do you expect the Escazú Agreement to make on similar cases?
6. What does Escazú signify for environmental democracy and the right of citizens to participate in Latin America and the Caribbean?